Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-39

LAWRENCE MARQUETTE, MIDWESTERN FARM LINES, INC. AND HARVEST MOON FARM LINES, INC.

Petitioners

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Respondents

AMERICAN TRUCKING ASSOC., INC., ET AL., INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ET AL., TRAFFIC EXECUTIVE ASSOCIATION, ET AL., NATIONAL COUNCIL OF FARMER COOPERATIVES, A.W.A.R.E., INC.

Intervenors

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners Lawrence Marquette, Midwestern Farm Lines, Inc. and Harvest Moon Farm Lines, Inc. pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above entitled case on April 26, 1979.

OPINIONS BELOW

The Court of Appeals for the District of Columbia Circuit affirmed the rulemaking decision and order of the Interstate Commerce Commission in Ex Parte No. MC-75 (Sub No. 1), *Agricultural Cooperative Transportation Exemption (Modification of Regulations)* in an unpublished memorandum decision filed April 26, 1979. The Court of Appeals judgment and memorandum is printed in Appendix A (p. 1a), the original decision and order of the Interstate Commerce Commission are printed at Appendix B (p. 6a), and the Commission's amendment thereto at Appendix C (p. 64a). The Court of Appeals stayed its mandate until July 9, 1979, pending the filing of a petition for a writ of certiorari and a final determination thereon by this Court.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Has the Court of Appeals for the District of Columbia Circuit erred in sustaining the Interstate Commerce Commission's view that the exemption from the Interstate Commerce Act for Agricultural cooperatives must be strictly construed?

2. Has the Court of Appeals for the District of Columbia Circuit erred in sustaining the Interstate Commerce Commission's rule which as promulgated would exclude all single trip leasing of unowned equipment for hire by agricultural cooperatives in the transportation of non-member, nonfarmer commodities?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The constitutional provisions involved are the self-incrimination and due process clauses of the Fifth Amendment

to the United States Constitution. The statutes involved are sections 10526(a)(5) (formerly §303(b)(5)), 11101(c)(1)(A) (formerly §304(f)), and 11144(c) (formerly §320(g)) of the Interstate Commerce Act; The Agricultural Marketing Act of 1929, 12 U.S.C. §1141 et seq.; 5 U.S.C. §§552, 553 and 559; the Administrative Procedure Act; 42 U.S.C. §6362(b) of the Energy Policy and Conservation Act; 42 U.S.C. § 4332(2)(c) of the National Environmental Policy Act of 1969; and 18 U.S.C. §1001. Regulations involved are 49 C.F.R. §§1047.21(a), 1047.22(b), and 1047.23. Pertinent excerpts of all provisions referred to above are reprinted in Appendix D (p. 88a).

Also involved is the Congressional Declaration of Policy set forth in the Agricultural Marketing Act of 1929, 12 U.S.C. 1141, which states in part:

> (a) It is declared to be the policy of Congress to promote the effective merchandising of agricultural commodities in interstate and foreign commerce so that the industry of agriculture will be placed on a basis of economic equality with other industries, and to that end to protect, control, and stabilize the currents of interstate and foreign commerce in the marketing of agricultural commodities and their food products—
>
> * * * * *
>
> (2) by preventing inefficient and wasteful methods of distribution.
>
> (3) by encouraging the organization of producers into effective associations or corporations under their own control for greater unity of effort in marketing and by promoting the establishment and financing of a farm marketing system of producer-owned and producer-controlled cooperative associations and other agencies.

STATEMENT OF THE CASE

Petitioners consist of an attorney and transportation counsel to the co-petitioners, and two agricultural cooperative associations, organized as defined in the Agricultural Marketing Act of 1929, 12 U.S.C. 1141j, heretofore engaging in interstate transportation under the agricultural cooperative exemption contained in the Interstate Commerce Act. All these petitioners were parties to the proceedings described below.

A. The Commission Proceeding

By a notice and order entered November 18, 1976, the Commission instituted a rulemaking proceeding pursuant to the Interstate Commerce Act and the Administrative Procedure Act. The stated purposes for the proceeding were (1) to more clearly define the exemption from regulation accorded motor vehicles controlled and operated by agricultural cooperatives or federations thereof and (2) to formulate new and revised requirements concerning record keeping and notice to the ICC with respect to certain transportation provided by agricultural cooperatives.

In response to the December 2, 1976 notice, more than sixty parties filed statements with the Commission commenting upon the nature and the need or lack thereof for the Commission's proposed regulations.

The Commission rendered a decision in the proceeding on December 22, 1977 (Appendix B, p. 6a). In its decision, the Commission while rejecting some of its proposed regulations, promulgated an amendment to 49 C.F.R. §1047.21(a) which proscribed the ability of agricultural cooperative's to utilize one-way trip-leases for the transportation of non-member, non-farm goods. The primary basis stated for this promulgation was that such transportation was not incidental and necessary to the primary transportation operation of cooperatives.

Petitions for administrative review were filed by the Petitioners herein. In a May 16, 1978 decision (Appendix C, p. 64a), the Commission denied the petitions for administrative review.

B. The Proceeding Before the Court of Appeals

On March 13, 1978, Petitioners sought review by petition to the Court of Appeals for the District of Columbia Circuit. The statute giving the Court of Appeals jurisdiction to review the decision and order of the Interstate Commerce Commission was 28 U.S.C. §§ 2321, 2344, 2347. By judgment and memorandum (Appendix A, p. 1a), filed on April 26, 1978, the Court affirmed the order of the Commission.

REASONS FOR GRANTING THE WRIT

The basic issue raised by this case involves encroachment by the Interstate Commerce Commission, through the exercise of its rulemaking powers, into statutorily exempt transportation services of agricultural cooperatives. The specific encroachments challenged by petitioners are: (1) a flat prohibition of one-way trip leasing transportation service by cooperatives to non-farm customers even in those cases where the provision of such services is essential to obtain backhaul business that is important to the economic viability of the cooperative's agricultural transport service; and (2) new notice and record keeping requirements that extend ICC administrative regulation into activities of agricultural cooperatives that are statutorily exempted from ICC regulation in both The Agricultural Marketing Act and The Interstate Commerce Act. Both of these specific subjects of complaint raise broader questions as to the proper boundary lines between the different legislative regimes established by Congress under The Agricultural Marketing Act and The Interstate Commerce Act, and as to the proper standards to be applied by the Interstate Commerce Commission in matters where its regulatory powers border statutorily exempt activities of agricultural cooperatives.

We would urge that this Petition brings before the Court a case of original impression as to the manner in which the Interstate Commerce Act and the Agricultural Marketing Act

are to be construed and reconciled by the courts and the Commission. In the same fashion that this Court found the basis for granting writ of certiorari in *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213(1966), we suggest that there is a serious need to resolve a conflict in the judicial interpretation of two major federal legislative schemes. The *Carnation* case considered the interrelationship of regulation under the Shipping Act, and regulation under the Sherman Act, and found that the Shipping Act could not be "construed as an implied repeal of all anti-trust regulation of the shipping industry's rate-making activities." 383 U.S. at 217.

We believe the Court in this case is presented with a similar question going to the interrelationship and possible collision of national policies expressed by Congress in agriculture and transportation.

In 1926, Congress enacted the Agricultural Marketing Act, 12 U.S.C. § 1141, et seq., to improve the economic well-being and efficiency of farmers and their cooperative associations. Congress declared its intention to:

> promote the effective merchandising of agricultural commodities in interstate and foreign commerce so that the industry of agriculture will be placed on a basis of economic equality with other industries, and to that end to protect, control, and stabilize the currents of interstate and foreign commerce in the marketing of agricultural commodities and their food products—
>
> * * * * *
>
> (2) by preventing inefficient and wasteful methods of distribution.
>
> (3) by encouraging the organization of producers into effective associations or corporations under their own control for greater unity of effort in marketing and by promoting the establishment and financing of a farm marketing system of producer-owned and producer-controlled cooperative associations and other agencies. 12 U.S.C. 1141.

The Act then defined, and provided for, cooperative associations including any association in which "farmers act together ... distributing and/or furnishing farm supplies and/or farm business services" with non-members in excess of the total value of their member transactions. 12 U.S.C. § 1141j.

In extending the Interstate Commerce Act to motor carriers in 1935, Congress recognized the need to exclude farmer-related transportation from ICC regulation, and exempted "motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act ... or by a federation of such cooperative associations, if such federation possesses no greater powers or purposes than cooperative associations so defined ...."

From 1935 to the present, the Commission, obviously frustrated at this limitation upon its generally pervasive regulatory powers, has sought to close the fence around this small province of regulatory immunity as closely as the law and the Courts would permit—and sometimes more closely than that.

In *ICC* v. *Jamestown Farmers Union Federated Co-op Transp. Ass'n,* 151 F.2d 403 (8th Cir. 1945), the Commission sought to enjoin the co-op from carrying livestock delivered to it by individual farmer-members and returning with merchandise to be sold to farmers. Because neither the cattle or the merchandise were picked up from or delivered to farm premises, the ICC saw a basis for tightening the exemption. The Court refused to enjoin the co-op, declaring:

> It is, of course, true that the exemption relied on by the appellee must be strictly construed when the necessity for construction arises. So construed, it may well be true, as the Commission contends, that a truck operated in interstate commerce by a farmers'

> cooperative for a purpose not within the contemplation of Congress in the Agricultural Marketing Act is not exempt from the requirement of a certificate of public necessity and convenience. But whether the interstate operation of such a truck is in an activity in which the farmers cooperative is or is not permitted to engage presents a question arising under the Agricultural Marketing Act, a *remedial statute, entitled to a liberal construction to effectuate the purpose for which it was adopted. It is this Act which requires construction here.* 151 F.2d at 404 (emphasis added).

It is precisely this accomodation that must, we submit, be made here. The Commission has construed the agricultural exemption, once more in an unlawfully restrictive fashion, relying on an overly literal reading of legislative history pertaining to an amendment to the Interstate Commerce Act, it has failed to give full and fair weight to the remedial nature of the Agricultural Marketing Act, which absent clear statutory expression to the contrary embodies a national policy transcending ICC common carrier regulations.

I. This case presents an important federal question of first impression concerning the boundaries between the Agricultural Marketing Act and the Interstate Commerce Act, and of proper standards of statutory construction; and a failure to arrest the ICC regulation will result in immediate, continuing and irreparable losses to farm cooperatives, both economically and in wasted energy.

The Commission's approach to the interpretive question presented herein is infected with the basic error that the agricultural exemption must be interpreted strictly, on the ground that all exemptions to the Interstate Commerce Act should be narrowly construed. We submit that this is error.

The Agricultural Marketing Act is itself remedial legislation, and therefore entitled to a broad construction to fulfill the objectives of that legislation. The Interstate Commerce Commission, moreover, in construing exemptions to its own jurisdiction in favor of a different, remedial statutory scheme, is not an impartial judge but, in effect, an interested party. The Commission's rulings in the instant case make abundantly clear the preference it is according to its own regulatory function over other legislative priorities. This misconception by the Commission of the proper statutory standard, and of its own sensitive role in such cases, serves to make this case a timely vehicle for establishing this fundamental principle.

The tension between the Commission's aggressive assertion of regulatory jurisdiction and the statutory exemption for agricultural cooperatives has been going on for years, but the proper standards for setting those boundaries remain unsettled, which leaves their determination by default to the Commission —an interested party. The practical effects of the present proceeding—which the Commission has failed to ascertain—can be substantial and will operate directly, and irreversibly, on sensitive agricultural and energy problems. Given the large number of people directly affected, and the conflicting federal agency and legislative schemes it would be wasteful and unnecessarily confusing to future policy makers to await the leisurely development of a conflict among circuits, or perhaps a case involving other issues. There is a substantial public interest at stake in this litigation.

II. The Commission's absolute ban on one-way trip leasing improperly bars activity that meets the standards of the statutory exemption.

Transportation of farm produce by agricultural cooperatives is exempted from the regulatory jurisdiction of the Interstate Commerce Commission. Insofar as transportation services by cooperatives are provided directly for member and farm

uses, there has been no real controversy. The problem arises from the economic reality that one-way transportation accompanied by an empty backhaul is often not economically viable. The only available backhauls are sometimes those of non-member, non-farm shippers. This problem led to an early recognition that such transportation, so long as it was only "incidental and necessary" to the basic agricultural cooperative transportation function, was within the meaning of the exemption and has been sanctioned by judicial decision and legislative amendment. Further experience has shown that there are some situations in which cooperatives, in order to secure their essential non-member backhaul business, must provide service to these same customers on an exceptional basis when their own equipment is not available, by one-way trip leasing of a third party's equipment. The Interstate Commerce Commission, seeking to restrict the activities of the cooperatives in any way it possibly can, has refused to consider such exceptional provision of service as "incidental and necessary."

The controlling legislative text is the Agricultural Marketing Act and section 203(b)(5) of the Interstate Commerce Act, the full text of which appears in Appendix D (pp. 88a-89a), and which provides in pertinent part:

> Nothing in this chapter, except the provisions of Section 304 of this title relative to qualifications and maximum hours of service of employees and safety of operations or standards of equipment shall be construed to include... (5) motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended, or by a federation of such cooperative associations, if such federation possesses no greater powers or purposes than cooperative associations so defined, *but any interstate transportation performed by such a cooperative association or federation of cooperative associations for nonmembers who are neither farmers, cooperative associations, nor federations thereof for compensation, except transportation otherwise exempt under this chapter, shall be limited to that which is incidental to its primary transportation operation and necessary for its effective performance and shall in no event exceed 15 per centum of its total interstate transportation services in any fiscal year, measured in terms of tonnage* .... (emphasis added).

The italicized portion was added by amendment in 1968, following the decision of the Ninth Circuit Court of Appeals in *Northwest Agricultural Cooperative Association, Inc.* v. *Interstate Commerce Commission,* 350 F.2d 252 (9th Cir. 1965), *cert. denied,* 382 U.S. 1011 (1966). The agricultural cooperative in that case had carried non-farm products on a backhaul from delivering agricultural products, and the Interstate Commerce Commission contended that cooperatives should not be allowed to transport any non-farm commodities. The court, applying the Agricultural Marketing Act as a remedial statute, rejected that contention, holding that the backhaul was only incidental to the cooperative's primary agricultural purpose and was necessary to the economic viability of that purpose.

The amendment, Public Law 90-433, upheld the principle of the *Northwest* decision and sought to assure against abuse by legislating the criteria of that case—"incidental and necessary"—and imposing a ceiling of 15% of total tonnage hauled for all non-farm transportation.

Both the Senate and the House Committee Report referred, in identical language, to the *Northwest* decision:

> As indicated previously, the Court in [the] *Northwest* decision defined "incidental and necessary" as follows:
>
> * * * On the uncontradicted facts, Northwest's transportation of non-farm products and supplies was

> incidental and necessary to its farm-related transportation both in character and in amount—incidental because limited to otherwise empty trucks returning from hauling member farm products to market, and producing a small return in proportion to Northwest's income from trucking farm products and farm supplies; necessary because it is not economically feasible to operate the trucks empty on return trips and because the additional income obtained is no more than required to render performance of the cooperative's primary farm transportation service financially practicable.
>
> The Committee intends by the phrase "incidental to its primary transportation operation and necessary for its effective performance" that a cooperative's for-hire transportation for non-members must have the direct relationship above described to the cooperative's farm-related transportation. S. Rep. No. 1152, H.R. Rep. No. 1667, 90th Cong., 2d Sess. (1968).

These Committees did not contemplate the situation presented here, and did not conceive of infringing on the ability of agricultural cooperatives to prevent "inefficient and wasteful methods of distribution" under the Agricultural Marketing Act. There was no intent to do other than require a reasonable nexus between the business of the cooperative, the contribution toward the efficiency in transportation, and the elimination of wasteful backhauls.

Nevertheless, the Interstate Commerce Commission in a rulemaking proceeding adopted the following definition (49 C.F.R. § 1047.21(a):

> (a) the phrase "incidental to its primary transportation operation and necessary for its effective performance" means that the interstate transportation of the cooperative association or federation of cooperative associations for non-members as described above is performed with the same trucks or tractors employed in a prior or subsequent trip in the primary transportation operation of the cooperative association or federation, that it is not economically feasible to operate the trucks or tractors empty on return trips (outbound trips in cases where the primary transportation operation is inbound to the association or federation), and that the additional income obtained from such transportation is necessary to make the primary transportation operation financially practicable.

This language, while more specific and restrictive than that of the Court in the *Northwest* decision—requiring use of the same vehicle is more limiting than "the same direct relationship"—did not evoke major controversy until the instant proceeding, begun by the Commission on its own motion in November, 1976:

> The reason for the institution of the instant proceeding is our realization that the pertinent regulations may not be having the effect contemplated. Contrary to expectations, the number of organizations claiming the exemption has grown and unlawful motor carrier operations and solicitations by 'sham' agricultural cooperatives is detrimentally affecting the regulated transportation industry.[1]

The Commission accepted written comments but declined requests for an oral, adversary type proceeding.[2] Among the comments submitted there was substantial evidence that the realities of trucking economics required flexibility to obtain backhaul traffic which itself can be vital to the successful operation of cooperative transportation. The Commission, however, in its December 1977 decision, purported to be:

> hard pressed to conjure up a one-way trip-lease situation which meets both the 'incidental and neces-

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[1] Appendix B, p. 8a.
[2] Appendix B, pp. 21a-22a.

> sary' and 'control' tests, and we doubt that there is one. Even if one were presented to us, the occasion would be so rare that the effect of the amendment on legitimate agricultural activities would be *de minimus* [sic][3]

On petition for administrative review, the Commission conceded the economic argument for one-way trip leasing by legitimate cooperatives. Referring to the argument made by the Agricultural Transportation Alliance, the Commission stated:

> Its basic assumptions, which we do not dispute, are that (1) cooperative transportation, whether performed for members or non-members, is rarely, if ever perfectly balanced one-for-one so that for every outbound load there is always a return load and (2) non-member traffic is important to the economical and efficient transportation of member traffic. From these premises it postulates that in order to protect the non-member backhaul traffic it receives from a shipper to balance its member transportation a cooperative must, for legitimate business reasons, accept additional traffic from such shippers... Such additional traffic, the Alliance argues, may not balance out its member transportation and may require movement of shipments of the cooperative which are *wholly unrelated* to a prior or subsequent movement by a member.... The Alliance concludes that this one-way trip leasing which enables a cooperative to retain its backhaul traffic and, in turn, to transport efficiently member traffic, is therefore incidental to a cooperative's primary transportation operation and necessary for its effective performance. (Emphasis in original)[4]

[3] Appendix B, p. 45a.
[4] Appendix B, p. 71a.

The Commission did not disagree with this economic case: "We sympathize with the plight of cooperatives in this regard,"[5] but concluded that such service does not meet the statutory test. This conclusion in turn rested not on the language of the statute, but on the Commission's own more restrictive regulations which require that the non-farm transportation be made in the same vehicle.

We submit that this was error. The Commission, by opening on its own initiative the entire question of cooperative non-member transportation services, threw open that entire subject—including its existing regulation—to *de novo* inquiry. The Commission, however, treated its existing regulation as a closed subject, disregarded the testimony of the President's Council on Wage and Price Stability as to the economic and energy waste that the Commission's proposal involved, failed to make a good faith effort to ascertain the specific facts as to the economic effects of its actions, which was compounded by the Commission's failure to provide either an energy impact statement required by the Energy Policy and Conservation Act 42 U.S.C. § 6362(b) or an environmental impact statement required by the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(c), and its own regulations, 49 C.F.R. § § 1108.9 and 1108.10. In each case the Commission relied on its own prior regulation to conclude that its new express prohibition of one-way trip leasing did not change prior law, despite the fact that the existing regulation was not effective and in need of clarification. The Commission thus failed, also, to satisfy the minimal standards of the Administrative Procedure Act, 5 U.S.C. § § 552, 553 and 559.

The Commission's proposed regulation also exceeds its statutory authority. The proposed regulation, 49 CFR § 1047.22 (b), requires cooperatives to prepare and retain for two years detailed and extensive records pertaining to all of the interstate transportation operations. The Commission, however, has no authority to require agricultural cooperatives to

[5] Appendix B, p. 72a.

prepare and retain any types of records. It has authority only, pursuant to § 220(g) of the Act, to "have access to . . . to inspect, examine and copy" all accounts, records, etc. which pertain to the motor vehicle transportation of the cooperative. That same section specifically prohibits the ICC from prescribing "the form of any accounts, records, or memorandums to be maintained by a cooperative association or federation of cooperative associations."

Further, the amendments to 49 C.F.R. § 1047.23 regarding notice required of agricultural cooperative associations who serve necessary and incidental non-farm, nonmembers exceed the agency's statutory jurisdiction. The regulation requires, *inter alia,* that all officers and directors provide the agency with information as to any affiliation they have had with other agricultural cooperative associations within the past five years; a certificate stating that all signatories of the notice will submit to § 220(g) visitation, inspection and copying of records pertaining to the interstate transportation conducted by a cooperative, regardless of the scope of the request for any such records; and a certificate providing that failure to file supplemental "notices" with the Commission subjects the individuals to criminal penalties pursuant to 18 U.S.C. § 1001. These notices, moreover, require representations to be made subject to the foregoing criminal sanction that require impossible knowledge of future acts and complicated legal issues such as:

> I have personally acquainted myself with the requirements of section 203(b)(5) of the Interstate Commerce Act and the Commission's regulation (49 CFR 1047.20 to 1047.23, inclusive) . . . that the association or federation on whose behalf this notice is filed is a cooperative association as defined in the Agricultural Marketing Act. . . which intends to engage in interstate transportation for non-members. . ; that the original of this notice is being filed with the Secretary, Interstate Commerce Commission, . . . that a copy of this notice shall be carried upon each truck or tractor

> engaged in interstate transportation pursuant to section 203(b)(5) of the Interstate Commerce Act . . . .

To require such open-ended exposure to criminal liability through required written statements is a violation of the Fifth Amendment to the Constitution of the United States.

In these requirements, as in the substantive question of the one-way trip-lease, the Commission is unilateraly seeking to extend its regulatory jurisdiction into matters that are statutorily exempt.

CONCLUSION

For the foregoing reasons, it is respectively requested that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1196, 78-1225 & 78-1227 **September Term, 1978**

No. 78-1227

LAWRENCE MARQUETTE, ET AL.,

Petitioners

v.

INTERSTATE COMMERCE COMMISSION
AND UNITED STATES OF AMERICA,

Respondents

NATIONAL MILK PRODUCERS FEDERATION, INC.,
AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ETC.,
TRAFFIC EXECUTIVE ASSOCIATION-EASTERN RAILROADS, ET AL.,
A.W.A.R.E., INC.,

Intervenors

PETITIONS FOR REVIEW OF AN ORDER OF THE INTERSTATE COMMERCE COMMISSION

BEFORE: BAZELON, LEVENTHAL and ROBINSON, Circuit Judges

JUDGMENT

These causes came on to be heard on petitions for review of an order of the Interstate Commerce Commission and were

argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. See Local Rule 13(c). On consideration thereof, it is

ORDERED AND ADJUDGED by this Court that the order of the Interstate Commerce Commission under review herein is hereby affirmed, in accordance with the attached memorandum.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

MEMORANDUM

Petitioners challenge the Interstate Commerce Commission's rulemaking proceeding in Ex Parte No. MC-75 (Sub. No. 1), in which the Commission revised its regulations implementing the agricultural cooperative exemption contained in section 203(b)(5) of the Interstate Commerce Act, 49 U.S.C. § 303(b)(5).[1] The primary revision to the existing regulations (49 C.F.R. 1047.21(a)) was the addition of the following sentence to clarify the scope of the Act's exemption for nonmember, nonfarm transportation that is "incidental to [the cooperative's] primary transportation operation and necessary for its effective performance":

> Transportation for nonmembers as described above performed by a cooperative or federation through the use of trucks or tractors trip-leased for one-way movements with the cooperative association or federation acting as lessee, is not incidental and necessary.

We agree with the Commission that this addition merely makes explicit the implicit prohibition against one-way trip leasing contained in section 203(b)(5) and the Commission's existing regulations. As the legislative history of the 1968 amendments to § 203(b)(5) indicates, Congress intended to exempt only that nonmember, nonfarm transportation which satisfied the "incidental and necessary" test described in the Ninth Circuit's *Northwest* decision.[2] *See H.R.REP. NO.* 1667, 90th Cong., 2d Sess. 5 (1968); *S.REP. NO.* 1152, 90th Cong., 2d Sess. 12-13 (1968). The direct relationship referred to by the court in *Northwest* was limited to the economically necessary transportation of nonfarm products in otherwise empty trucks returning from hauling member farm products to market. Moreover, the existing regulations define "incidental and necessary" to include only nonmember transportation "performed

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[1] This provision has since been revised without substantive changes and recodified at 49 U.S.C. § 10526(a)(5).

[2] Northwest Agricultural Cooperative Association, Inc. v. ICC, 350 F.2d 252 (9th Cir. 1965), *cert. denied,* 382 U.S. 1011 (1966).

with the same trucks or tractors employed in a prior or subsequent trip in the primary transportation operation of the cooperative association or federation." By its very nature, therefore, one-way trip leasing is not "incidental and necessary" as that phrase has been interpreted by Congress and the Commission. Thus, the explicit prohibition of one-way trip-leased movements is a rational exercise of the Commission's rulemaking authority and is fully consistent with Congressional intent.

Petitioners also challenge the revised notice and record keeping requirements promulgated by the Commission. The notice requirements are adopted pursuant to § 203(b)(5)'s mandate that any cooperative performing interstate transportation for nonmembers "shall notify the Commission of its intent to perform such transportation prior to the commencement thereof." The Commission's regulations are not overly burdensome and are reasonably designed to provide the Commission with the information needed to determine whether those cooperatives proposing to engage in nonfarm, nonmenber transportation are rightfully entitled to the exemption under § 203(b)(5). Similarly, the record keeping requirements adopted by the Commission, although more detailed, are needed if the Commission is to fulfill its statutory responsibility to enforce the tonnage limitations in § 203(b)(5). The regulations do not run afoul of § 220(g) since they only require that certain information be recorded and do not dictate the form in which that information is to be kept.

Finally, the instant rulemaking proceeding did not violate either § 102(2)(c) of NEPA or § 382(b) of EPACA. Because the prohibition on one-way trip leasing was merely a clarification of existing law, it did not constitute a major regulatory action that would trigger either of these provisions. Moreover, in its May 16, 1978 decision on reconsideration, the Commission explicitly considered the energy and environmental implications of its action and reasonably concluded that the prohibition on one-way trip leasing should have no significant impact.

For the foregoing reasons, the decision and order of the Interstate Commerce Commission in Ex Parte No. MC-75 (Sub-No. 1), *Agricultural Cooperative Transportation Exemption (Modification of Regulations)*, is

Affirmed.

APPENDIX B

INTERSTATE COMMERCE COMMISSION

EX PARTE NO. MC-75 (Sub-No. 1)
AGRICULTURAL COOPERATIVE TRANSPORTATION EXEMPTION
(MODIFICATION OF REGULATIONS)

Decided December 22, 1977
(Service Date January 10, 1978)

Upon notice of proposed rulemaking, consideration given to modification of the present regulations (1) to define more clearly the exemption from economic regulation accorded motor vehicles controlled and operated by agricultural cooperative associations or federations thereof, and (2) to formulate new and revised requirements concerning record keeping and notice to the Commission respecting certain transportation provided in such motor vehicles. Upon investigation of views, arguments, and representations of the parties, many proposed definitional changes found to be inconsistent with the law, not in furtherance of the purpose for which they were proposed, and therefore, rejected; record keeping and notice provisions found to be reasonable and necessary. Appropriate modifications of the rules and regulations adopted and an appropriate order entered.

Richard A. Bruder, Mary H. Calhoon, Lawrence Marquette, and *Congressman Ted Risenhoover* on their own behalf.

Bob Bergland and *Paul L. Mills* for the Department of Agriculture of the United States.

James E. Armstrong and *Dellon E. Coker* for the Department of Defense of the United States.

Robert W. Crandall, Thomas M. Lenard and *Roy A. Nierenberg* for the Council on Wage and Price Stability.

L. Stewart McCloud and *Robert F. Turkington* for the Bureau of Investigations and Enforcement of the Interstate Commerce Commission.

W.H. Beeson for the Arkansas Transportation Commission.

Lee M. Rife for the Illinois Department of Agriculture.

Senator Hubert H. Humphrey and *Jon Wefald* for the Minnesota Commission of Agriculture.

Dr. Kenneth B. Creer for the Utah Agricultural Development Council.

Sumner Katz and *Paul Rogers* for the National Association of Regulatory Utility Commissioners.

Robert L. Calhoun, John F. Donelan, J.R. Jennings, David N. Schwartz, W.K. Smith, Paul J. Tierney, Fred H. Tolan, Winston G. Van Dame, and *Frederic L. Wood* for shipper related interests.

Eldon S. Olson, and *Edward K. Wheeler* for labor interests.

John R. Bagileo, Eldered N. Bell, Jr., R.F. Box, Harry J. Breithaupt, Jr., H.J. Bruce, Nelson J. Cooney, Robert L. Dausend, R.E. DeLand, William F. Foley, Frank Hiljer, Jr., Fritz R. Kahn, Alfred G. Krebbs, William Phillips, Edwin E. Piper, Jr., Bryce Rea, Jr., and *James M. Souby, Jr.,* for carrier related interests.

William J. Augello, C.W. Bath, Gary J. Brown, W.N. Bump, Clifford N. Carlsen, Jr., J.S. Crawford, John C. Datt, Floyd E. Grabiel II, Leo Grabil, Jr., Charles C. Hall, R. E. Harridge, Patrick D. Hely, Wayne H. Hoecker, Harold O. Hoelscher, R. V. Hokanson, Jerry A. Horne, Charles M. Howell, John St. John, James S. Krzyminski, Richard J. Lloyd, Dixon R. Loos, Lloyd M. Massey, Huga Oja, Jack Pearce, R. J. Redmond, Barry Roberts, Donald G. Rose, Charles M. Saunders, Jr., A.C. Schultz, Frank L. Sigloh, and *Carl W. Struby* for cooperative related interests.

REPORT OF THE COMMISSION

BY THE COMMISSION:

By Notice and Order entered November 18, 1976, this Commission, on our own motion, instituted this rulemaking proceeding pursuant to Sections 203 and 204 of the Interstate Commerce Act (49 U.S.C. §§ 303 and 304) and 5 U.S.C. §§ 522, 553, and 559 of the Administrative Procedure Act. This proceeding is the sequel to our initial report on the subject of the agricultural cooperative exemption, *Implementation of P.L. 90-433 - Agric. Coop. Exemption,* 108 M.C.C. 799 (1969). In the prior report we prescribed regulations for implementing relatively recent statutory changes to the agricultural cooperative exemption. The reason for the institution of the instant proceeding is our realization that the pertinent regulations may not be having the effect contemplated. Contrary to expectations, the number of organizations claiming the exemption has grown and unlawful motor carrier operations and solicitations by "sham" agricultural cooperatives is detrimentally affecting the regulated transportation industry. The purpose of this proceeding is to (1) to define more clearly the exemption from economic regulation accorded motor vehicles controlled and operated by agricultural cooperative associations or federations thereof, and (2) to formulate new and revised requirements concerning record keeping and notice to the Commission respecting certain transportation provided in such motor vehicles.

John R. Bagileo, Eldred N. Bell, Jr., R. F. Box, Harry J. Breithaupt, Jr., H. J. Bruce, Nelson J. Cooney, Robert L. Dausend, R. E. DeLand, William F. Foley, Frank Hiljer, Jr., Fritz R. Kahn, Alfred G. Krebbs, William Phillips, Edwin E. Piper, Jr., Bryce Rea, Jr., and *James M. Souby, Jr.,* for carrier related interests.

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The Order initiating this rulemaking proceeding set forth the changes or additional regulations proposed (reproduced as Appendix A to this report) and a justification for each revision. Interested parties were invited to submit their views in writing to the Commission; the Bureau of Enforcement of this Commission, now the Bureau of Investigations and Enforcement, was authorized and directed to participate.

BACKGROUND

The special status and treatment of agricultural cooperatives has its roots deep in our country's history. Accordingly, to enable the participants and the general public to have a full understanding of the issues involved in this proceeding we will begin with a brief history. We will trace the exemption from the statutory scope of Federal enactments accorded agricultural cooperatives and the reasoning behind their special treatment, especially as it relates to transportation. In so doing we must, of necessity, reiterate certain statutory language set forth in our prior report which forms the fundamental framework for our later examination of the evidence of record.

Congressional legislative history makes references to farmer cooperatives as far back as the late 1800's.[1] Agricultural cooperative associations were defined and expressly exempted from tax and remedial legislation at the turn of the century and thereafter.[2] As the agrarian sector of society began to shrink,

[1] Agricultural interests attempted to propose an amendment to the Sherman Antitrust Act of 1890 expressly exempting farmer associations from the antitrust law. It was rejected, one reason being that such "agricultural combinations" were obviously understood to be distinct from the nonagricultural economic trusts intended to be outlawed. See Edwin G. Nourse, *The Legal Status of Agricultural Cooperation,* New York, The Macmillan Company, 1927, pp. 241-246.

[2] See generally *Legal Phases of Farmer Cooperatives,* Information 100, Farmer Cooperative Service, United States Department of Agriculture, 4th Revision, May 1976. More specifically, the Revenue Acts of 1916 (39 Stat. 756, 757, Sec 11), 1921 (42 Stat. 227, 253), 1926 (44 Stat. 9, 40), and 1934 (48 Stat. 680, 701) were precursors of many of the provisions contained in the Agricultural Marketing Act and section 203(b)(5) of the Interstate Commerce Act.

Congress continued to hold agricultural cooperatives in a favored light recognizing their value to the interdependent economy. In 1929 Congress enacted the Agricultural Marketing Act (hereinafter referred to as the AMA) stating its purposes as follows:

> It is declared to be the policy of Congress to promote *the effective merchandising of agricultural commodities in interstate and foreign commerce* so that the industry of agriculture will be placed on a basis of economic equality with other industries, *and to that end to protect, control, and stabilize the currents of interstate and foreign commerce in the marketing of agricultural commodities and their food products*—(1) by minimizing speculation; (2) by preventing inefficient and wasteful methods of distribution; (3) by encouraging the organization of producers into effective associations or corporations under their own control for greater unity of effort in marketing and by promoting the establishment and financing of a farm marketing system of producer-owned and producer-controlled ccooperative associations and other agencies; and (4) by aiding in preventing and controlling surpluses in any agricultural commodity, through orderly production and distribution, so as to maintain advantageous domestic markets and prevent such surpluses from causing undue and excessive fluctuations or depressions in prices for the commodity. (emphasis added).

Section 15(a) of the AMA defines a cooperative association as:

> any association in which farmers act together in processing, preparing for market, handling, and/or marketing the farm products of persons so engaged, and also means any association in which farmers act together in purchasing, testing, grading, processing, distributing, and/or furnishing farm supplies and/or

farm business services. Provided, however, that such associations are operated for the mutual benefit of the members thereof as such producers or purchasers and conform to one or more of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein; and

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third. That the association shall not deal in farm business services with or for nonmembers in an amount greater in value than the total amount of such business transacted by it with or for members. All business transacted by any cooperative association for or on behalf of the United States or any agency or instrumentality thereof shall be disregarded in determining the volume of member and nonmember business transacted by such association.

Congress specifically exempted agricultural cooperative associations from economic regulation by the Interstate Commerce Commission in section 203(b)(5) of the Motor Carrier Act of 1935, presently Part II of the Interstate Commerce Act, (hereinafter referred to as the Act). The exact wording exempts "motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended. . . ." In 1940, Congress amended the exemption to encompass "a federation of such cooperative associations, if such federation possesses no greater powers or purposes than cooperative associations so defined."

The exemption was judicially construed to permit agricultural cooperatives to deal in nonfarm-related nonmember traffic as outlined and discussed in our prior report on this topic. It

remained in that form until 1968 when Public Law 90-433 was enacted in response to recommendations made by this Commission and supported by the regulated carrier industry and a number of cooperative organizations. This law amended section 203(b)(5) of the Act by adding the following provisions:

> but any interstate transportation performed by such a cooperative association or federation of cooperative associations for nonmenbers who are neither farmers, cooperative associations, nor federations thereof for compensation, except transportation otherwise exempt under this part, shall be limited to that which is incidental to its primary transportation operation and necessary for its effective performance and shall in no event exceed 15 per centum of its total interstate transportation services in any fiscal year, measured in terms of tonnage: *Provided,* That, for the purposes hereof, notwithstanding any other provision of law, transportation performed for or on behalf of the United States or any agency or instrumentality thereof shall be deemed to be transportation performed for a nonmember: *Provided further,* That any such cooperative association, nor federations thereof, except transportation otherwise exempt under this part, shall notify the Commission of its intent to perform such transportation prior to the commencement thereof: *And provided further,* That in no event shall any such cooperative association or federation which is required hereunder to give notice to the Commission transport interstate for compensation in any fiscal year of such association or federation a quantity of property for nonmenbers which, measured in terms of tonnage, exceeds the total quantity of property transported interstate for itself and its members in such fiscal year.

At the same time section 220 of the Act was amended by adding subsection (g) which reads as follows:

> (g) The Commission or its duly authorized special agents, accountants, or examiners shall, during normal business hours, have access to and authority, under its order, to inspect, examine, and copy any and all accounts, books, records, memorandums, correspondence, and other documents pertaining to motor vehicle transportation of a cooperative association or federation of cooperative associations which is required to give notice to the Commission pursuant to the provisions of section 203(b)(5) of this part: *Provided, however,* That the Commission shall have no authority to prescribe the form of any accounts, records, or memorandums to be maintained by a cooperative association or federation of cooperative associations.

It was understood that the proper administration of the amendments would require this Commission to promulgate rules and regulations to implement these provisions. Our prior report on this subject and the instant proceeding were instituted toward that end.

The *Implementation of P.L. 90-433* proceeding produced a set of regulations providing guidelines for those persons and entities seeking to operate pursuant to the exemption of section 203(b)(5) of the Act, as amended by Public Law 90-433. The regulations adopted were set forth at subsection 1003.1(a) and sections 1047.20 through 1047.23 of Parts 1003 and 1047, respectively, of Subchapter A, Chapter X of Title 49 of the Code of Federal Regulations. They prescribed definitions of various terms, the computation of tonnage allowable in nonfarm-nonmember transportation, the overall limitation of nonmember transportation, and the form and requirements for notice of intent to perform interstate transportation for certain nonmembers, as set forth in Appendix A hereto. The report specifically noted that the regulations were not all-inclusive and

future supplemental rulemakings might be required to deal with pseudo-cooperatives and the meaning of some statutory phrases.

Subsequent to the *Implementation of P.L. 90-433* report, unlawful motor carrier operations by alleged or "sham" agricultural cooperatives continued to expand. The regulations prescribed did not stem the tide of illegal operations, and what was once an isolated area of concern developed into a national problem as related in various newspaper and magazine articles.[3] This increased the Commission's awareness and concern for the adverse impact that such operations were having on regulated transportation. The number of organizations operating under agricultural cooperative status has been steadily rising, and enforcement actions concluded by the Commission and the courts have revealed evidence showing that a significant amount of tonnage normally handled by regulated rail and motor carriers has been diverted from these two modes by organizations claiming the agricultural cooperative exemption. Against this background of events this rulemaking proceeding was instituted to remedy the abuses of the agricultural cooperative exemption as amended by Public Law 90-433.

THE REPRESENTATIONS

Statements were filed by 4 Federal government agencies or departments, 4 State government agencies or departments, 1 quasi-governmental organization, 15 motor, rail, or water carriers or related associations of such carriers (the statements filed jointly by the Traffic Executive Association—Eastern Railroads, Western Railroad Traffic Association, Southern Freight Association, and Association of Railroads are referred to as the "Railroads" and those of the American Trucking Associations, Inc. and Committee on Transportation Practices,

[3] See for example Jean Strickland, "Illegal Co-ops: Rape of the Regulated Carriers", *Commercial Car Journal,* July 1976.

Inc., including National Motor Freight Traffic Association, Inc., Regular Common Carrier Conference and Common Carrier Conference-Irregular Route are referred to as the "American Trucking Association, et al."), 5 shippers or shipper-related organizations, 1 labor union, 27 agricultural cooperatives, federations of agricultural cooperatives or related associations, and 4 individuals. We appreciate the time and effort expended by these participants in enlightening us on this complex and technical topic. The comments proved to be invaluable in assisting us in reaching our decisions in this report.

The comments cover the entire spectrum of views on the subject from total rejection of all proposed additions and changes to complete adoption of the regulations as proposed. In general, there was universal approbation for the objective of the proceeding but sharply differing views on the Commission's choice of the means to achieve the end. Many participants offered their own suggested changes or favored those advanced by organizations of which they are members. However, at this point a brief overview of the various positions will provide a useful frame of reference for our later section-by-section analysis of the proposed rule changes and our ultimate conclusions.

The sides were drawn along those lines that would normally be expected. The cooperative-related organizations vehemently resist what they see as efforts to limit or restrict the scope and manner of their operations. The Secretary of Agriculture of the United States and other parties agree that the effect of the new or changed rules would be further undesirable restrictions or, in some cases, complete elimination of the exemption for cooperatives legally entitled to operate under it. In almost all cases the cooperative interests recognize (and to some extent sympathize with) the "sham cooperative" problem to which the proposed regulations are aimed, but they feel that the method of attack is too sweeping in its direct assault on legitimate cooperative activities and its burdensome operational requirements. One agricultural cooperative which would be in danger of losing its exemption summed up its position by

calling the Commission's action "reminiscent of the concept of killing the dog to get rid of the fleas". Many cooperatives as well as the Secretary of Agriculture, the Arkansas Transportation Commission, the Illinois Department of Agriculture, the Minnesota Commissioner of Agriculture, and the Utah Agricultural Development Council echoed or supported Commissioner Christian's dissenting stand in our Order instituting this proceeding; they believe that new or changed rules will not materially assist the Commission in combating the sham cooperative problem while vigorous enforcement of current laws, regulations, and penalties will deter chronic abusers of the exemption. Although most comments from this group cite one or more of the proposed regulations as being in direct conflict and contrary to the relevant statutes, the vast majority are willing to accept reasonable record keeping and notice provisions that aid in detecting illegal operations.

From its own economic vantage point the Council on Wage and Price Stability opposes further restrictions on the exemption characterizing them as inflationary. It spells out a logical sequence of events to support its position. It claims that limiting the exemption results in more regulation of carriers and operations previously beyond the bounds of regulation. More regulation, in turn, results in inefficiencies of operation (because of equipment utilization restrictions), higher rates (because of rate bureaus),[4] and generally higher transportation charges. The increased costs are ultimately passed on to the consumer in the price of food and other products transported. Richard Bruder, one of those appearing on his own behalf, takes a similar position pointing out the economic importance of cooperatives to the family farm. He believes that if cooperatives are forced out of business, farmers will incur higher costs for

[4] The Council contends that the higher rates charged by regulated carriers provide the incentive for exempt carriers to enter the market. It advocates increased competition as a means of driving down rates and solving the problem to which the proposed regulations are aimed.

services now provided by the cooperatives. The aforementioned State agencies from Illinois and Utah concur, and Minnesota cooperatives have analyzed the economic impact and found it to be in the millions of dollars. The Commissioner of Agriculture of that State, noting the timing of the proceeding, points out that the changes will hinder the agricultural economic recovery of the farm industry which is already in poor financial shape because of adverse weather and the energy crisis.

PPG Industries, Inc., General Mills, Inc., Eli Lilly and Company, and the Pacific Northwest Traffic League clearly set out the dilemma of the shipper. The Department of Defense, as a contractor of transportation services, is in a somewhat similar position. They are constrained by the economics of business to move their products by the most inexpensive and efficient means possible, yet they lack access to the information that would inform and enable them to distinguish between legitimate cooperative transportation and illegal activities. They generally reject the amendments which they see as an attempt to redefine the law but support the record keeping and notice provisions as an aid in determining lawful operators and operations. At least one of these shippers view the problem of the proliferation of agricultural cooperatives as a direct response to an unfilled need of western and southern shippers for protective motor carrier service which existing carriers are not meeting. To make operations economical such organizations must solicit some nonmember, nonfarm-related traffic from the east or midwest to return their protective equipment. This shipper sees the rulemaking as a failure in not addressing the actual source of the problem. In contrast, Congressman Ted Risenhoover recognizes that rulemaking is aimed at the illegal activities of certain carriers but believes that part of the problem involves shippers, and enforcement action should be taken against the shipper who aids and abets the unlawful transportation.

The regulated carrier industry and the Bureau of Investigations and Enforcement of the Interstate Commerce Commission (hereinafter referred to as the Bureau) support

supplemental regulations to deal with bogus cooperatives and diversion of regulated traffic. Surprisingly, however, the carriers do not necessarily agree with the form or content of the regulations proposed. In fact most alternative and additional modifications originated with carrier interests. These emphasize compliance with stricter provisions and requirements *before* cooperatives are permitted to operate under the exemption. Representations from all three modes of surface transportation depicted the enormity of the problem against which this proceeding is directed by presentations of figures concerning the large volume of traffic being diverted by organizations claiming the agricultural exemption. They also explained the difficulty in competing with these associations for traffic, primarily maufactured goods moving from the east to the west. This is traffic that is used as a backhaul by agricultural cooperatives transporting farm-related products from the west or southwest eastward to markets.

PRELIMINARY MATTERS

Before proceeding to the substance of the proposed rules we must dispose of some preliminary jurisdictional and precedural matters. Although many of the participants in this proceeding have challenged the Commission's power to propose specific regulations which contravene the statutes they are supposed to clarify, these arguments are substantive in nature and will be answered later in this report. However, a few parties, most notably Lawrence Marquette, an attorney submitting a statement on his own behalf, contend that the rulemaking in itself is beyond the jurisdiction of the Commission. He maintains that there is no provision in law empowering the Commission to promulgate the proposed regulations.

The Interstate Commerce Act is remedial legislation and the Commission may adopt regulations to carry out the policies of the laws which it administers where such regulations have a reasonable and rational basis. This is true even though no

specific statutory authority to promulgate regulations on the subject is contained in the law. See *Greyhound Corp.* v. *U.S.*, 221 F. Supp. 440, 444 (N.D. Ill. 1963) and cases cited therein. Section 204(a)(6) of the Act has been interpreted as reflecting the intention of Congress to vest the Commission with broad powers to promulgate such regulations as are required to effectively enforce Part II of the Act. *United States* v. *Resler*, 313 U.S. 57, 60 (1941), *Wycoff Company* v. *United States*, 240 F. Supp. 304, 308-309 (D. Utah, 1965).

Section 204(a) of Part II of the Act reads as follows:

> It shall be the duty of the Commission-
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> * * *
>
> (6) To administer, execute, and enforce *all provisions* of this part, to make all necessary orders in connection therewith and *to prescribe rules, regulations,* and procedure for such administration; (emphasis added).

Section 203(b)(5) is one of the provisions of Part II of the Act. Section 204(a)(6) authorizes this proceeding. Mr. Marquette, however, argues that section 204(f) specifically excludes agricultural cooperatives from regulation by rule promulgation. This pertinent section is discussed fully elsewhere in this report. Suffice it to say that Section 204(f) only prohibits the Commission from acting in the narrow area of the duration of motor vehicle leases, contracts, or other arrangements for use of a motor vehicle or the amount of compensation to be paid to agricultural cooperatives; it is not a blanket prohibition against prescribing rules over all aspects of agricultural cooperative transportation. This is especially true if such transportation falls outside the statutory bounds of the exemption in which case it is common or contract carriage subject to the full regulatory scheme of the Act.

If there is any doubt that Congress intended that the Commission have the authority under the Act to promulgate the regulations, then the legislative history of Public Law 90-433,

the amendments to which this rulemaking is addressed, should erase that doubt. The Senate Report on the legislation stated the following:

> The subcommittee [on Surface Transportation of the Committee on Commerce] print contained a proviso specifically authorizing the Commission to prescribe reasonable rules and regulations for the administration of this exemption. The Department of Agriculture urged that this proviso be deleted as unnecessary inasmuch as the ICC is granted responsibility for the administration of the provisions of the Interstate Commerce Act. The Department noted that it has not been necessary to express specific authorization for the Commission to interpret other parts of section 203(b) and they saw no reason why it should be necessary for this part.
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> * * *
>
> The need for Commission rulemaking power to administer the provisions of the committee amendment is obvious.
>
> * * *
>
> The committee amendment does not contain specific authority to the Commission to prescribe rules, regulations, and procedures because the committee considers that such power is already available to the Commission in the Interstate Commerce Act.[5]

The Commission's rulemaking power in this area is beyond further dispute and we proceed to the parties' objections to the manner in which this proceeding is being handled.

A number of parties have called for oral hearings, oral arguments, informal conferences, and the preparation and circulation of a service list for the purpose of giving participants

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[5] Senate Report No. 1152 (90th Cong., 2nd Sess.) p. 15.

the opportunity to submit reply statements. These additional procedural steps to the administrative process have been suggested or demanded for the purposes of presenting witnesses, cross-examination, and the opportunity to respond to opposing arguments.

Absent constitutional, statutory, or other legal requirements it is entirely within the Commission's discretion on how it proceeds with this rulemaking. The Commission has complied with the notions of procedural due process by giving notice to the public and giving interested persons an opportunity to participate through the submission of written statements. The Administrative Procedure Act requires no more as it speaks in terms of participation "with or without opportunity for oral presentation."[6] In this type of case where the administrative body undertakes legislative action applicable to a general class of persons an oral hearing is not required. The economics of time, expense, and convenience dictate such a result. Likewise informal conferences or reply statements are not mandatory and nothing in the Interstate Commerce Act or the General Rules of Practice compel such a procedure.

Upon careful analysis we have determined that all views have been properly and sufficiently aired and all participants' rights to be heard have been protected. We see little value in an adversary-type proceeding. We are aware of the vital interests at stake but we believe the record presents ample data and views for us to make a rational determination of all the issues.

DISCUSSION AND CONCLUSIONS

DEFINITIONS

The definitions of the various terms contained in the regulations are of great significance. They not only form the interpretative basis for the functional provisions of the rules but

[6] Section 553(c), 5 U.S.C. section 1003(b).

the definitions in and of themselves set out the limits for eligibility and operation under the agricultural cooperative exemption. Almost every party to this proceeding commented on, and in most cases criticized, the changes in this area. Each definitional change will be discussed. Reference should be made to Appendix A where the present and proposed definitions are juxtaposed.

Cooperative Association. The additions to the definition of this fundamental term elicited large and overwhelmingly negative responses from agricultural interests and carrier interests alike. Their attack focuses on (1) the power of the Commission to alter the meaning of the term to something different from that contained in the relevant statutes, and (2) the impact upon farmers, cooperatives, and consumers.

Section 203(b)(5) of the Act and the present regulation define an agricultural cooperative by reference to the AMA, the pertinent portion of which defines a "cooperative association" as:

> . . . any association in which farmers act together in *processing, preparing for market, handling, and/or marketing* the farm products of persons so engaged, and also means any association in which farmers act together in *purchasing, testing, grading, processing, distributing, and/or furnishing, farm supplies and/or farm business services.* Provided, however, that such associations are operated *for* the mutual benefit of the members thereof as such producers or purchasers . . . . (emphasis added).

The proposed modification would redefine the term "cooperative association" in such a manner as to limit the transportation exemption to an organization which both conforms to the definition in the AMA and "is engaged in transportation only as an incidental and necessary adjunct to its primary business enterprise as a producer and processor of agricultural commodities." In addition, the second sentence of the proposal

requires that "the cooperative association must be operated and controlled by and for the benefit of its farmer members through its duly elected officers and directors."

This is a substantial change. The Secretary of Agriculture, the State agencies, and the cooperatives vividly underscore this point. The ramifications are far reaching in their effect on legitimate farm cooperatives legally operating under the exemption today. The amendments essentially restrict the type and structure of entities entitled to the agricultural cooperative exemption. The amendment consists of two parts (sentences) which will be discussed separately, but both parts are open to the parties' general challenge to what they consider an attempt to circumvent the statutes by regulation.

The cooperative interests find that the first sentence proposed regulation attempts to limit the definition of cooperative association much more narrowly than that provided in the AMA. It imposes an "incidental and necessary" test and a "primary purpose" doctrine where the AMA definition contains no such requirements.

It would certainly make the exemption unavailable to organizations whose sole purpose is to provide motor transportation which is not an incidental and necessary adjunct to another primary business enterprise. Yet, the AMA definition authorizes cooperatives to engage in handling, marketing, and distributing related functions without regard to other primary business enterprises. To qualify the association need only perform one of the enumerated functions. The justification offered for the proposed restrictive approach is that many purported cooperatives are, in reality, nothing more than transportation entities hauling nonmember traffic. Therefore, removal of the exemption for all transportation cooperatives would eliminate the shams. However, there are many bonafide cooperatives in this proceeding that are organized solely for the purpose of providing transportation services *for members* and they are no less legitimate and lawful than other types of

cooperative associations which operate vehicles in connection with producing or processing enterprises. See *Interstate Commerce Commission* v. *Jamestown Farmers Union Federated Cooperative Transp. Assn.*, 57 F. Supp. 749 (D. Minn. 1944), aff'd 150 F. 2d 403, 404 (8th Cir. 1945), and *Northwest Agricultural Cooperative Association, Inc.* v. *Interstate Commerce Commission,* 350 F. 2d 252 (9th Cir. 1965), cert. denied, 382 U.S. 1011 (1966).

By restricting the exemption to cooperatives which are primarily producers and processors, the new definition would also cut out farm supply cooperatives. This type of cooperative is specifically included in the AMA definition. A number of the participating cooperatives perform this function by providing farmer members with vital farm-related products such as feed, seed, fertilizers, petroleum products, farm machinery, and hardware used in agricultural production. They currently meet the qualifications of the AMA but they would cease to qualify for the exemption if the proposed modification were enacted.

The National Council of Farmer Cooperatives (NCFC) and others call attention to the fact that there is even a serious question whether marketing or processing cooperatives would qualify under the amendment. The pertinent proposed language is phrased in terms of the additive conjunction (a producer *and* processor of agricultural commodities) rather than the alternative conjunction (or). The NCFC knows of many cooperatives which provide a processing function but none which also qualify as producers. Production of agricultural commodities is not considered to be the function of the cooperative itself but rather of its members. Transportation, supply, and other types of cooperatives still meet the statutory requirement of being conducted for the *members'* mutual benefit as producers of purchasers and are therefore, entitled to the exemption under the law.

The Agricultural Services Association, Inc., notes that if the amendment were adopted, the term "producer and processor of agricultural commodities" would have to be defined so as to

make it clear whether it includes cutting, cleaning, blanching, freezing, and packaging of raw agricultural commodities. Without further clarification the proposed regulation invites litigation.

The Bureau states that in prescribing the present regulations the Commission noted that those courts considering the application and construction of both Section 203(b)(5) of the Act and Section 1141(j) of the AMA have all held that the transportation activities of a cooperative must be incidental to its primary statutory activity and necessary to the effective performance of that activity. But the courts were referring to nonmember traffic.

Under the first proposed sentence transportation, supply, and other kinds of cooperatives would be prevented from operating under exempt status even though such organizations provided transportation services or supplies exclusively to farmer *members* without engaging in any nonfarm nonmember transportation. The sham cooperative problem principally involves the transportation of nonmember nonfarm-related traffic but this proposal fails to make the distinction and denies the exemption to all transportation and supply cooperatives. This is a point of paramount significance. The proposed "incidental and necessary" test has been (and is) easily confused with the requirement of section 203(b)(5) that *nonmember nonfarm-related* transportation be "incidental to the primary transportation operation and necessary for its effective performance." We take issue with the Bureau's conclusion that this modification essentially codifies the existing law.

The first sentence is overbroad and would sacrifice the existence of heretofore legitimate cooperatives for the prospect of eliminating shams. As the American Transportation Alliance aptly phrased the effect, it "promises to get rid of the weeds by burning the crop." The cooperatives whose operations have been placed in jeopardy by the amendment contend that if they lose their exemption they will either be forced out of business or forced to raise rates. Moreover, farmers, if they can afford the

added costs, may not be able to obtain supplies and transportation at their most critical periods. This, the Alliance and the Council on Wage and Price Stability argue, will ultimately be reflected in higher consumer prices.

The second sentence of the amended definition relating to operation and control of cooperatives is ambiguous and also beyond the scope of the statutes defining agricultural cooperatives.

Section 1(a)(3) of the AMA declares the intent of Congress that producers organize into associations "under their own control". *Agricultural Transp. Assn. of Texas Investigation,* 102 M.C.C. 527, 541-42 (1966), aff'd 275 F. Supp. 528 (N.D. Tex. 1967). The definitional section of the same act, the standard to which section 203(b)(5) refers, mentions only operation *for the benefit* of members but not necessarily *by them.* Some cooperatives felt that the new language implied that farmers must participate in the actual operation of the cooperative. The fact that farmers do not take an active role in the operation of the cooperative does not alone indicate a lack of control. *United Agric. Transp. Assn. Com. Car. Applic.,* 120 M.C.C. 67, 77 (1974). Other cooperatives interpreted the sentence to mean that all officers and directors need be farmers. It would appear that grass roots control through the election of management would be in compliance with the proposal. However, the election of directors who appoint officers, the usual business practice, would not meet the requirements since it is written in terms of control through *elected* officers. Delegation of actual operations to managers, a management entity, employees or agents would seem to be precluded altogether. It certainly is not clear. Big Sky Farmers and Ranchers Cooperatives of Montana argues that cooperatives should have the same rights as other business enterprises to engage talented management and employ specialists, agents, and professionals to carry out the day-to-day operation of the transportation function and the proposed language will hamper effective management.

In any event this part of the proposal will not accomplish what it is intended to do—to clarify. On the contary it tends to confuse the issue and may well lead to protracted litigation. If the objective is to prevent the existence of fictitious or sham cooperatives which purport to have members that are nonexistent or members who have neither sought membership nor formally been accepted as members, as the case cited in the justification statement implies,[7] it would more appropriately be addressed in that section of the regulations defining "member", rather than here where it alters the statutory definition.

The cooperative interests vehemently contest the Commission's power and authority to redefine "cooperative association". They contend that Congressional intent on the subject is clear in connecting eligibility for the exemption with compliance with the AMA. We agree.

In the *Northwest* case, *supra,* the Court, when referring to the legislative history of the pre-1968 version of section 203(b)(5) said:

> Nothing in the debate suggests that Congress intended to limit the type of commodity hauled *or otherwise condition the exemption granted to any organization which qualified as an Agricultural Marketing Act "cooperative association."* 350 F. 2d at 254. (emphasis added)

Of course, Congress did amend the Act in 1968 limiting nonexempt, nonmember, nonfarm business. But it is significant that the limitation was imposed by amending the Interstate Commerce Act rather than the Agricultural Marketing Act. In viewing the text of this change in the context in which it was made, it is clear that Congress was not seeking to redefine "cooperative association" but was only attempting to limit the exempt business of such associations as defined, for purposes of the Interstate Commerce Act. In contrast to this limited

[7] See *I.C.C.* v. *KSI Farm Line Co-Op, Inc.,* 407 F. Supp. 145 (E.D. Wis. 1976).

Congressional action the Commission proposal attempts to redefine the term "cooperative association" in a manner affecting the status of such associations.

In our last report on this topic we explictly rejected comparatively minor modifications to the definition of agricultural cooperative contained in the AMA in favor of direct reference to the AMA definition as is currently done in Section 203(b)(5) of the Act. See *Implementation of P. L. 90-433, supra,* at 806-807. We pointed out that the legislative history of Public Law 90-433 plainly revealed Congress' intent. Both the Senate and House Committee reports stated, in identical and unequivocal language, that:

> [the bill] is not intended to alter existing law defining cooperative associations or federations of cooperative associations. The definitions and limitations set forth in the Agricultural Marketing Act of 1929, (2 U.S.C. 1141j) . . . would continue to apply.[8]

The evidence and arguments of the parties persuade us, and the legislative history of the statute compel us, to reach a similar result here. It is a basic tenet of administrative law that the rulemaking power of an administrative agency is not the power to legislate but merely the power to fill in details within the limitations of a statute. *American President Lines* v. *Mackey,* 120 F. Supp. 897, 899 (D.C. D. C., 1953). An administrative agency may not by regulation alter, amend, enlarge, or restrict a statute. *Celebrezze* v. *Kilbourn,* 322 F2d 166 (5 Cir. 1963). When the meaning and intent are unambiguous, there is no need or justification for administrative action. We accept the contentions of the various parties that we lack the legal power to modify the definition to something contrary to the Act and the AMA and that it would not be in the public interest to do so.

[8] S. Rept. No. 1152, *supra,* at 10; House Report No. 1667 (90th Cong. 2d sess.) p. 4.

There remains one choice for us to make—whether to retain the regulation in its present form or, as the Railroads suggest, to set forth the entire definition contained in the AMA in order to inform the cooperatives and the shipping public exactly what is and what is not a *bona fide* cooperative.

We opt to follow the latter course. It will be of benefit to shippers and cooperatives alike to be able to locate this definition in the same place as the definitions of other terms and all our rules and regulations pertaining to the cooperative exemption rather than to search through other federal statutes to find it. All things considered, we conclude that the complete AMA definition of "cooperative association" as contained in the attached notice is reasonable and necessary and should be set forth in its entirety in the regulation.

Federation of Cooperative Association—The Notice of Proposed Rulemaking set out the present definition and the justification statement briefly stated that there were no changes or additions proposed. The statement is technically correct but not totally accurate. The definition of a federation of cooperative associations is tied into the definition of a cooperative association by means of the phrase "which federation possesses no greater powers or purposes than a cooperative association as defined in paragraph (a) of this section". Any amplification, limitation, or alteration of the definition of cooperative association by necessity affects the definition of a federation of such associations.

A federation's activities will not be exempt under Section 203(b)(5) if its members fail to qualify as cooperative associations under the proposed revised definition of that term, and it may also lose the exemption under that definition if its sole purpose is to transport its members' commodities. Although we have not adopted the proposed changes to the former definition, we note that any changes there will be reflected here as well. Nothing more need be said about this definition except as it relates to the proposed changes to the meaning of "member" which will be discussed next.

Member—The current definition of member does not distinguish between membership in a cooperative association or federation thereof and includes any farmer or cooperative association which meets certain tests. The proposed definition retains the same tests but divides membership into two separate categories. The first is the case of a cooperative association where "member" means any farmer; the second is the case of a federation of cooperative associations where "member" means any cooperative association. The Commission's justification in the Notice states that no substantive change is contemplated and the subsection simply has been rewritten for the purpose of clarification.

Two observations are in order. First, despite the fact that no substantive change is contemplated, such a change would result if the proposed language were adopted. Whereas the present definition permits cooperative membership in a cooperative association and farmer membership in a federation of cooperative associations, such would be proscribed under the proposed change. A cooperative association could have only farmers as members while a federation of cooperative associations could have only cooperative associations as members. The result would be the elimination of mixed farmer and cooperative association membership within a single federated cooperative association.

We find no rational reason for this substantive change. Agricultural cooperatives, whether federated or not, have as their objective service to farmers. Whether this be accomplished at the federated level or otherwise makes little difference to the farmer members. If farmer members can be served indirectly by a federated cooperative by virtue of membership in a cooperative that is a member of the federated cooperative, there is no logic in denying that farmer direct access to the services of the federated cooperative as a farmer member. Furthermore, the implications of the proposed change reach far beyond the composition of associations. Membership is linked to member transportation, and the proposed change would

exclude from member transportation the transportation performed by the federation on behalf of a farmer member.

Second, this amended definition conflicts with the definition of federation of cooperative associations in the preceding subsection, Section 1047.20(b). Such a federation is defined as "a federation composed of either two or more cooperative associations, *or one or more cooperative associations and one or more farmers* . . ." (emphasis added). Furthermore, the proposed definition does not comport with the Commission's holding in *Edgerton Coop Oil Assn.—Investigation,* 105 M.C.C. 100, 105-106 (1967), wherein the Commission recognized that mixed membership does not change an organization's status and entitlement to the partial exemption of Section 203(b)(5).[9]

In light of the apparently unintended substantive change and inconsistencies, the proposed change appears to be an inadvertent error in the omission of the words "or farmer" after "cooperative association". Be that as it may, the current definition is sufficiently clear in its meaning and intent and we see no reason to amend it, especially in the manner proposed.

The Railroads suggest a substantive addition to the present definition aimed at the fictitious membership roles of sham cooperatives. They urge that a "member" be required affirmatively to seek, and the cooperative affirmatively to accept, membership in a cooperative. The American Trucking Association, et al., propose a similar requirement that prospective members actually apply for membership. The Commission is well aware of the bogus cooperative practice of including as members the names of persons having no knowledge of their ostensible membership. The language of the present regulation was directed at that problem in defining "member" as one which "has consented to be, has been accepted as, and is a member in good standing in accordance with the constitution,

[9] See also *Agricultural Transp. Assn. of Tex. Investigation,* 96 M.C.C. 293, 298 n.2 (1964).

bylaws, or rules of the cooperative association or federation of cooperative associations." We believe that to the extent the proposals of the Railroads and the American Trucking Association, et al., are not already incorporated in the rules, expressly or by implication, they will do little to curb the present practice which remains a problem of detection and enforcement. The added requirement will not act as a deterrent to those organizations which choose to circumvent the requirements of the act since it too will just as easily be disregarded. On the other hand, it may lead to future interpretational and organizational litigation regarding solicitation and membership procedures. Rather than dilute our manpower arguing minor rule changes, we will concentrate our energies on finding, enjoining, and prosecuting fraudulent cooperatives and their organizers.

The Railroads' idea of a new subsection relating to control, set out fully in the summary in Appendix B, also strikes at the heart of this fraudulent cooperative problem, but the same limitations militate against its acceptance at this point in time. We will retain the subsection language as is, but if after devoting our time and resources in the field we find that substantive changes are necessary, we may reconsider these suggestions and proceed in the direction proposed by the transportation associations herein.

Member Transportation—This is the crux of the Commission's proposals. Ironically, but not surprisingly, the participants had the most difficulty interpreting this subsection which they termed complicated, contradictory, confusing, unintelligible, and incredible. After painstaking analysis the Railroads and cooperative-oriented interests came to the conclusion that the Commission has concentrated on the wrong topic—the emphasis here is on transportation for *members* when illegal transportation for *non*members should be the chief concern since that constitutes the major portion of illegal activity and causes the greatest harm to regulated carriers.

Crucial to an understanding of this subsection is the proposition that, contrary to the plain meaning of the terms, all

transportation performed by a cooperative for its members is not necessarily "member transportation". (By the terms of the following subsection, 1047.20(g), transportation which does not qualify as "member transportation", as defined, is "nonmember transportation.") The current regulation reflects this fact:

> The term "member transportation" means transportation performed by a cooperative association or federation of cooperative associations for itself or for its members *but does not include transportation performed in furtherance of the nonfarm business of such members.* (emphasis added).

The classic example of "nonmember transportation" for a member is the member farmer who utilizes cooperative transportation services in furtherance of his construction business. This classification is consistent with the legislative history and Congressional intent[10] of the Act, and the courts and Commission concur.

The proposal, however, goes one step further and attempts to proclaim that not only is the nonfarm business of farmer members excluded from the category of member transportation but that the nonfarm business of the *cooperative association or federation* itself is excluded as well. This would be accomplished by the insertion of three words strategically placed so that member transportation "performed by a cooperative association or federation of cooperative associations does not include transportation performed in the furtherance of the nonfarm business *of itself or* of such members." Neither Congress nor the courts has gone so far.

In a similar vein the proposal imposes a farm-related percentage ratio test in determining the portion of transportation of manufactured or processed goods for members that should be considered member transportation. (The mechanics

[10] See *S. Rept. No. 1152, supra,* at 10, 11, 13, and 14 and *H. Rept. No. 1664, supra,* at 6 and 7.

of the formula will be discussed below). It is well settled that the transportation of goods manufactured or processed by a member *farmer* constitutes nonmember transportation,[11] but the formula is made applicable to transportation for member cooperative associations (i.e. of a federation), and perhaps for the hauling cooperative itself.

The drafters of the proposal have failed to realize that cooperatives do not engage in farming *per se* and the imposition of a farm-related test disregards this fundamental fact. Cooperatives engage in the activities enumerated in the AMA—processing, preparing for market, purchasing, testing, grading, etc. Transportation for member cooperatives (or the cooperative itself) pursuant to these legitimate cooperative activities is member transportation. The farm-related test may be relevant in determining whether tonnage transported for a member farmer is member or nonmember transportation, but an analogy cannot be drawn to transportation for cooperative associations or transportation performed by the cooperative for itself. This is evident by reference to the underlying statutes.

The statute to which these rules are directed, Section 203(b)(5) of the Act, establishes two categories of nonmember traffic: (1) an overall category which includes all nonmember traffic,[12] the transportation of which measured in tonnage may not exceed member transportation tonnage during any fiscal year (referred to as the 50 percent limitation) and (2) a more restricted category of nonmember traffic, the transportation of which measured in tonnage is limited to 15 percent of total

[11] *Agricultural Transportation Association of Texas* v. *U.S.*, 274 F. Supp. 528 (N. D. Tex. 1967), *Ag Carriers, Inc.—Investigation of Operations,* 124 M.C.C. 250, 255-256 (1976). Under the proposed formula it is possible that such farmer member transportation may be classified as "member transportation" contrary to established doctrines.

[12] This applies to any cooperative or federation required to give notice to the Commission, see 49 CFR 1047.23.

transportation tonnage in any fiscal year.[13] The second category applies to transportation "for nonmembers *who are neither farmers, cooperative associations, nor federations thereof...*" (emphasis added). The aim of the proposal is to place member cooperative nonfarm-related transportation within this 15 percent nonmember category.

A cooperative association may provide exempt *member* transportation services for both farmers and other cooperative associations, *in their capacities as farmers or cooperative associations.* The reason transportation for member farmers will not be considered "member transportation" (as noted earlier), but rather "transportation for nonmembers who are not farmers", is because when farmers call upon the cooperative to aid their nonfarm business, they are not acting *as* farmers and therefore, they do not qualify as members of a cooperative.[14] On the other hand, a cooperative may legally engage in the "nonfarm business" activities enumberated in the AMA and still retain its status as an agricultural cooperative.

If an association meets the requirements of the AMA, it *is* a cooperative association and any transportation performed for it is done for it in its capacity as a cooperative association. (This principle also holds true where the cooperative performs transportation for itself). If it is a *member* cooperative, such transportation services are exempt from economic regulation. If it is a *nonmember* cooperative, such transportation is still not subject to the 15 percent limitation because it is a nonmember which *is* a cooperative in the capacity of a cooperative. Of course, the 50 percent limitation on overall nonmember traffic may apply in the latter instance.

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[13] It also includes an incidental and necessary test and notice requirements discussed *infra.* If we accept the Bureau's argument and classify certain traffic as nonmember, not only would this traffic be subject to the percentage limitations but it also must meet these tests and requirements as well.

[14] See *Machinery Haulers Assn.* v. *Agricultural Commodity Serv.*, 86 M.C.C. 5, 19 (1961), and the definition of "farmer," 1047.20(d) which is qualified "to the extent engaged in farming operations either as a producer of agricultural commodities or as a farm owner."

What the Commission's proposal appears to do is to set percentage limitations on manufactured or processed goods which are transported by the cooperative and which can not be related back to raw agricultural commodities produced by the cooperative or its members. The Railroads define the question as whether the law looks to the origin of raw materials in setting percentage limitations on nonmember traffic. In the case of farmers, whether members or not, the answer is clearly in the affirmative. The 15 percent limitation is applicable to farmer traffic unrelated to farm activities. In *Ag Carriers, Inc.—Investigations of Operations, supra,* the titled transportation cooperative transported traffic for three members *which were not cooperatives* but which were engaged in "mixed operations" of shipping raw materials raised by them in their respective farming operations and raw materials purchased through outside sources. The Commission held that the percentage of the shipments attributable to their nonfarm activities constituted nonmember transportation subject to the 15 percent limitation.

The Commission carefully distinguished the situation of a third member *which was a cooperative.* This cooperative processed and marketed citrus products on behalf of its members. Part of its processing activity involved the manufacture of tin cans, a small portion of which were sold to outsiders. The tin plate which was used to manufacture the cans was transported by Ag Carriers. A question arose as to whether the portion of tin plate tonnage representing sales of cans to outsiders was nonmember traffic subject to the 15 percent limitation. For the purpose of disposing of the proceeding, the Commission concluded it was not. In reaching its decision the Commission noted that there was no suggestion that the member cooperative had lost its status as a bona fide cooperative by engaging in such limited outside activities.

There is no language in the relevant statutes to the effect that cooperatives may not purchase raw commodities from nonmember sources, process them, and transport the processed goods under the Section 203(b)(5) exemption. The revenue

test in the AMA places limits on the extent of such activities but does not prohibit them by any means. Assuming that the traffic of a cooperative is transported in furtherance of its legitimate cooperative activities and that the 50 percent *revenue* limitation is met, the association retains its status as a cooperative and may enjoy the exemption of Section 203(b)(5).

The Commission's proposal, by limiting the "member transportation" a cooperative may transport for itself to that which is farm related and connecting it to a mathematical test based on a percentage of raw agricultural commodities transported, has far reaching effects on the operations of agricultural cooperatives. Many are involved in the transportation of what is termed "non-farm related" property such as dressed meat, frozen concentrated citrus products, and manufactured food items as well as raw materials and packaging supplies from outside sources necessary for legitimate cooperative activities. Classifying such operations as "nonmember" imposes severe statutory limitations upon cooperatives. And, the ratio test virtually eliminates the exemption for all supply cooperatives. Therefore, the Bureau's belief that the effect on legitimate cooperatives would be minimal, if any, is unfounded.

It may well be true that extensive operations in the transportation of manufactured and processed commodities historically have been indicative of sham cooperative transportation activities. However, the proposed farm-related requirement (as it applies to cooperative transportation on its own behalf) and the proposed mathematical test, which place severe limits on transportation operations unrelated to transportation of raw agricultural commodities, would deprive legitimate cooperative activities from the benefit of the exemption. Congress did intend the transportation of a variety of commodities and supplies to move within the 203(b)(5) exemption which differentiates it from the separate *commodity* exemption in 203(b)(6). The proposed changes to this section undermine Congressional intent and blur this distinction.

The percentage ratio test requires that a number of calculations be made to determine the extent of member transportation. First, the cooperative must ascertain if a member processes goods. Then it would see to carry for the member no greater proportion of processed goods to raw goods than the member has in its overall operations in order to hold its transportation activities within "member transportation". For each farmer member provided with transportation services, as well as for cooperatives, figures would have to be available for (1) transportation of manufactured or processed goods, (2) transportation of raw agricultural goods, (3) production of manufactured or processed goods, and (4) production of raw agricultural goods. Interpretating the language of the proposal is a task in itself; making the necessary and numerous calculations is a burdensome exercise.

The practicality of the formula has been called into question by cooperative and transportation interests. The Alliance says that cooperatives serving tens or hundreds of members, mixing member products in shipments, routing trucks between multiple points, and trying to meet the market needs of members, simply could not manage any such requirement without gross rules of thumb which would have the general effect of blockading processed products. It provides examples of situations which present interpretational problems. Mid-America Farm Lines submits other well-defined examples and contends that the proposal will disallow the exemption for legitimate, farm-related, processed commodities (1) transported by a federation for a cooperative association which is only a processor because of the requirement that the shipping entity itself be a producer of raw commodities (this is so even though cooperative associations of producers organized exclusively to perform a processing function have been recognized and sanctioned by the courts); and (2) transported by a federation or cooperative for members who do not use such organizations as their transportation agents for processed commodities to the same extent that they use such organizations for the transportation of raw commodities. The latter is the result

of the "transported for/produced by" test which ignores commercial realities in failing to recognize that members may use their own vehicles for certain of their transportation needs or may belong to more than one such organization and utilize different organizations' services according to their respective marketing areas.

Even if the cooperatives could overcome these hurdles and inequities, the proposal may be an exercise in futility because the Railroads take the position that it may be practically and legally unenforceable. They note that the Commission has not provided for compilation of production statistics in its proposed rule on records; and even if it had, the Commission might not be able to inspect such records because under Section 220(g) of the Act, it may inspect only records "pertaining to motor vehicle *transportation*" of a cooperative. Congress did not contemplate inspection of *production* records as evidenced by the House Committee report which stated that the inspection authority extended "only as to [cooperatives'] *transportation* activities." (emphasis added).[15]

No matter how persuasive the legal and logical arguments urging adoption of this subsection have been, we seriously doubt that implementation of the proposed provisions would have the desired result. The lawyers, practitioners and other experts submitting statements have had trouble enough understanding the mechanics, meaning, and implications of this section. We could hardly expect laymen, shippers, and employees of agricultural cooperatives who are less familiar with this area to comprehend and comply with all aspects of the proposal. Adoption would surely lead to burdensome requirements, needless litigation, and honest operation mistakes by legitimate cooperatives. At the same time it would have little, if any, positive effect on illegitimate organizations operating under the umbrella of the partial exemption of section 203(b)(5). We have no reason to believe that organizations

[15] *H. Rept. No. 1667, supra,* at 7.

which fail to comply with present percentage limitations would comply with the more complex ones proposed. Adoption of the proposal would not prove to be a deterrent or weapon of any significant value in the Commission's arsenal, nor would it simplify the enforcement problem. Yet, it would impinge on and reduce the level of activities legitimate cooperatives may engage in. Certainly, it would not result in the clarification of the existing regulation.

In the spirit of simplification and clarification, the Railroads and the National Milk Producers Federation propose an entirely new set of terms and definitions which they believe offer an effective and understandable framework for enforcement. We feel that such a total revamping of terms and definitions has merit and offers advantages over the proposed system. However, this suggested overhaul is so substantial a change that we believe it would be unfair and a denial of procedural due process of law to make extensive comments about them or implement them in this proceeding without a full dialogue with interested parties, some of which may not be participants here. More importantly, we are not convinced such major alterations will serve our purpose or will be worth any delay or confusion that might follow. We have identified the illegal cooperative transportation to be terminated and we shall proceed expeditiously pursuant to the assertion of the regulatory powers and procedures to be adopted later in this report. If, in time, our experience leads us to the conclusion that changes in terminology are warranted and essential to enforcement, we will reevaluate this area and consider these suggestions.

The final sentence of the Commission's proposal is a mere reiteration of the language in the Act concerning transportation performed for or on behalf of the United States, its agencies or instrumentalities. The meaning is clear on its face, consistent with legislative intent and court decisions;[16] and the regulation

[16] See S. Rept. No. 1152, *supra,* at 13, H. Rept. No. 1667, *supra,* at 5, and *Interstate Commerce Commission* v. *Big Sky Farmers and Ranchers Marketing Cooperative of Montana,* 451 F. 2d 511, 514 (9th Cir. 1971).

does not interpret or otherwise expound upon the literal language. No adequate justification has been given for repeating the statutory language in a regulation and we find no benefit in doing so. The regulation, as written, will be retained.

OTHER SECTIONS

Computation of tonnage allowable in nonfarm-nonmember transportation—The proposed addition to this section consists of a single sentence which relates to nonmember traffic falling within the 15 percent limitation category and which must be incidental to the primary transportation operation and necessary for its effective performance. This sentence states that: "Such transportation shall not include transportation performed through the use of one-way trip-leased vehicles."

There was universal confusion over the intent and meaning of this one sentence. It is susceptible to varying interpretations. It can be construed to prohibit transportation of traffic in trip-leased vehicles with the agricultural cooperative or federation acting as (a) lesee i.e., leasing of equipment to the cooperative, (b) lessor, i.e., leasing of equipment by the cooperative, (c) both lessee and lessor. The responses of the participants to this proceeding encompass all three possible interpretations. This makes the need for a clarification of language most obvious if we expect comprehension, compliance, and enforcement to be effective.

The explanation for the diverse interpretations hinges on the justification statement.[17] The context in which the trip-lease

[17] The justification statement's discussion of the cooperative practice of transporting nonfarm nonmember traffic in back-to-back moves, "sandwich moves" etc., has no direct relevance to the proposed change to this section since such moves do not necessarily involve trip-leasing. (They are pertinent by analogy to other practices which fail to meet the "incidental and necessary" test). This tended to confuse the issue and organizations such as the Alliance gave examples where such practices, integrated with trip-leasing, do not fly in the face of the purpose of the section and represent efforts to operate cooperative equipment as efficiently as possible.

provision is set leads one to believe that it is concerned with the cooperative as lessee because under normal circumstances utilization of vehicles not owned or operated by the cooperative would not meet the "incidental and necessary test". However, the justification statement speaks in terms of bona fide and non-bona fide trip-leases and makes reference to the *Ag Carriers* case. This case involved a single trip-leasing of a vehicle, with a driver, *by* an agricultural cooperative *to* a regulated carrier. The bona fides of the trip-lease was not challenged. The Commission held that the tonnage handled should not be tabulated as either member or nonmember traffic to the cooperative.[18] It said the shipper's contract of carriage is with the regulated carrier, the movement is made pursuant to its operating authority and tariffs, and it has full responsibility for and control over the shipment, the driver and the vehicle for the duration of the lease. It characterized the cooperative merely as a lessor of the motor vehicle.

If a valid trip-lease arrangement of this type exists, the regulations may not prohibit it. The Act, Section 204(f), permits trip-leasing of vehicles of cooperative associations by expressly forbidding the Commission from regulating the duration of a lease, or the amount of compensation to be paid for such use. Moreover, the general regulations pertaining to equipment exchanges make certain exceptions for vehicles of agricultural cooperatives or federations but only for movements "in the general direction of the general area in which such motor vehicle is based." Thus, there is a built-in limitation analogous to certain aspects of the "incidental and necessary" test. This type of trip-leasing fosters the objectives set out in the

[18] If the proposed language was intended to mean, and it is a possible construction given the title of the section, that trip-leasing by a cooperative as lessor shall not be included in the 15 percent nonmember category (or any member or nonmember category) as the Commission in the *Ag Carriers* case opines, then it is accurate. The Commission distinguished the situation where the lease was not bona fide and merely a guise for an unauthorized operation subject to the 15 percent limitation.

AMA and other legislation exempting agricultural cooperatives from their provisions. As the Council on Wage and Price Stability points out, it complements the agriculturally associated operations of cooperatives by preventing the return of empty vehicles. This saves fuel, reduces costs, and keeps down the inflationary price spiral of food products. In the process it also offers a source of equipment for regulated carriers, and it may help the efficiency and revenue capacity of the industry. The industry supports retention of the practice.

By the same token trip-leasing of this variety through the use of "agents" promotes the expeditious, economical return of equipment. This is done by the agents' matching shippers' needs, empty cooperative equipment, and authorized carriers, and does not contravene the purpose of this provision as the justification statement suggests. For all these reasons the Commission's proposal will be amended to make it clear that trip-leasing with the agricultural cooperative as lessor is not what is being curtailed. On the other hand, trip-leasing with the cooperative as lessee, or the "cooperative agent" soliciting traffic for the cooperative in that capacity, should be prohibited. Such one-way trip-leasing does not meet the definition of "incidental and necessary" as set out in part (a) of the same Section. By definition, providing one-way nonmember transportation in vehicles leased from another entity would not qualify as an operation performed with the same truck or tractor employed in a prior or subsequent member trip. It does not offset any economic loss otherwise encountered in an empty truck or tractor which has participated in an outbound or inbound trip for a member. Also, such arrangements could hardly meet the equipment limitation contained in Section 203(b)(5), i.e., motor vehicles "controlled and operated by" a cooperative association, as interpreted by the Commission.[19]

[19] In *Machinery Haulers Assn.* v. *Agricultural Commodity Serv., supra* at 28, the Commission established a dual factor test for determining statutory control:

> (1) the motor vehicles either must be owned by the cooperative association, or it must be in the lawful possession thereof and be used and operated by such association

(footnote continued)

We are hard pressed to conjure up a one-way trip-lease situation which meets both the "incidental and necessary" and "control" tests, and we doubt that there is one. Even if one were presented to us, the occasion would be so rare that the effect of the amendment on legitimate agricultural cooperatives would be *de minimus.* Yet, the ease with which we could enforce the provision against cooperatives hauling nonmember traffic would be substantially enhanced because it would preclude the necessity of tracing a broad range of movements to show that such movement was not incidental to its primary transportation operation and necessary for its effective performance. Furthermore, NARUC explained the difficulty trip-leasing causes in determining who is properly handling a nonmember shipment. Sham operators could no longer cover up illegal activities by claiming to be on trip-leases for a cooperative; only carriers holding the requisite authority from the Commission could trip-lease cooperative equipment. Prohibiting this practice strikes at the most common arrangement employed by sham cooperatives in conducting unlawful transportation and diverting the major portion of traffic from the regulated motor carrier industry. Nevertheless, Sunkist Growers, Inc., and other cooperatives complain that our amended regulation would be overly restrictive and contrary to Section 204(f) of the Act. We disagree. We would not be limiting the *duration* of any lease, as contended, and we are not prohibiting all trip-leasing, but rather concentrating only on one-way trip leasing where the cooperative is the lessee on movements of certain nonmember traffic which is already limited as to volume. The "incidental and necessary" test applies only to tonnage hauled for nonmembers who are *neither farmers nor*

(footnote continued)

> as if it were, in fact, owned by the cooperative; and (2) the driver of the vehicles must be a bona fide employee of the cooperative association and possess no duties, obligations, responsibilities, or interests inconsistent with its obligations to that association.

See also *Agricultural Transp. Assn.* v. *Florida Pub. Ser.,* 108 M.C.C. 96 (1968).

cooperative associations and has no application to transportation provided by a cooperative association for itself, its members, or for nonmember farmers or cooperative associations. The proscription against trip-leasing proposed in this section could have no application to such activities as might be implied from the placement and breadth of the language proposed.

We will add a sentence to the present section, as written, in conformance with what has been said thus far about the ambiguity of the language proposed. And we will place the sentence at the end of the second paragraph defining "incidental and necessary" rather than in the first paragraph, as proposed, for the sake of clarity of modification. The first and third paragraphs will remain undisturbed. All things considered, we are of the opinion that an addition to this section is reasonable and necessary.

Nonmember Transportation Limitation and Record Keeping—The addition of a new subsection dealing with record keeping requirements for cooperatives performing nonmember transportation is proposed for the purpose of easing enforcement of the exemption. As the justification statement points out investigations of the propriety of the transportation of nonmember traffic are often seriously hampered by the lack of factual records as well as by the failure of the regulations to specify the minimum information required. Sham cooperatives take refuge in the lack of record keeping requirements and do not keep the information needed to make a determination of the propriety of the transportation. The Commission is forced to expend large amounts of time and financial resources in developing the necessary information from other sources. The proposal sets out minimum informational requirements relative to nonmember transportation.

The participants credit the proposal with being aimed in the right direction, but they question the Commission's authority to promulgate the regulation. The fundamental power of the Commission to require that records be kept cannot be

disputed. It is derived from the exemption itself; without such information, enforcement of the Congressionally prescribed limitations of P. L. 90-433 contained in Section 203(b)(5) would be a formidable task. Elsewhere in this report we discussed the general powers of the Commission in this context, and we called attention to Section 204(a)(6) of the Act empowering the Commission to enforce all provisions of Part II and to prescribe rules, regulations, and procedures for administration. More specifically, Section 220(g) of the Act gives the Commission access to and authority "to inspect, examine, and copy any and all accounts, books, memorandums, correspondence and other documents pertaining to motor vehicle transportation of a cooperative association or federation of cooperative associations which is required to give notice to the Commission pursuant to the provisions of Section 203(b)(5)...".

Ironically, the main thrust of the legal arguments *against* adoption of the requirements centers on the *limitations* of this same Section 220(g). The proviso to the section states that "the Commission shall have no authority to prescribe the *form* of any accounts, records, or memorandums to be maintained by a cooperative association or federation of cooperative associations." (emphasis added). We take the position of the regulated carriers and cooperatives that what is proposed here does not prescribe the "form" but rather the "substance" of the matters to be kept on record and therefore, is not violative of the proviso or the intent of the section.[20] Under our proposed new section, a cooperative's records may be in any form—as long as the information is kept.

As a matter of policy, the Bureau asserts that there is a clear distinction between prescribing the form of business records and requiring that persons seeking the benefit of an exemption prepare and retain certain information to substantiate their privileged status to enjoy such exemption. It has

[20] Other sections of the Act specifically authorize the Commission to prescribe "forms" of accounts and records and specifically prohibit noncompliance. Compare section 220, 49 U.S.C. 320(d).

been held that exemptions from the Act are to be strictly construed, and an organization seeking to enjoy the exemption of Section 203(b)(5) of the Act should and must be prepared to substantiate proper qualification or the intent and purpose of Part II of the Act would be defeated. The Bureau draws a parallel to the manner in which tax exemptions and deductions are handled and must be proven in an audit.

Other than this proviso the cooperative interests have not found any provision in the Act suggesting that the Commission may not prescribe the recording of transportation data necessary to determine if a cooperative is operating properly under the exemption of Section 203(b)(5). This is not a failing on their part. The body of Section 220(g) was enacted to enable the Commission to obtain the information necessary to police operations conducted under the exemption of Section 203(b)(5).[21] Implied authority to prescribe the contents of such information is a reasonably necessary adjunct to the authority to investigate. For Congress to have given the Commission explicit inspection powers over cooperatives' transportation records would have been a futile act unless the Commission also could prescribe the information necessary for determining compliance with Section 203(b)(5).

Two comments on the proposed section are in order. First, the information required to be kept should be germane to the enforcement of the statutory provisions of the partial exemption contained in the Act and to certain relevant provisions of the AMA which are incorporated into the Act by reference. For this reason we agree with the cooperatives and others that the portion of the proposed addition in item (3) requiring the keeping of "the number of packages" be dropped. Likewise, we agree that all of item (f) be dropped. The portion of item (g) relating to special services will also be deleted but the substance of the item, total charges, will be relettered, rephrased, and retained.[22] For the same reason, we will adopt the

[21] S. Rept. No. 1152, *supra*, at 15-16.

[22] Transportation *revenue* information is relevant in proving for-hire transportation, in determining qualification as a cooperative association under the third of the AMA criteria, and in other ways identifying a sham cooperative.

suggestions that the information required to be kept contain (1) a designation of whether the transportation was (i) member transportation as defined in 1047.20(f), (ii) nonmember transportation for nonmembers who are farmers, cooperative associations, or federations thereof, (iii) other nonmember transportation, and if of class (iii), how it was incidental and necessary as defined in 1047.21(a); and (2) a copy of all leases executed by the cooperative or federation to obtain equipment to perform transportation under Section 203(b)(5). The rationale for the first addition is self-explanatory. The other would aid the Commission's determination of whether leased vehicles are "controlled and operated" by the cooperative or federation in accordance with the equipment limitation of Section 203(b)(5) of the Act. The information will not be made.

Second, as with the proposed definition of member transportation, this new section may be unenforceable. The proposed section by its language, affects any cooperative or federation performing transportation for nonmembers *of any type*, including nonmember farmers or cooperatives. The Commission's visitorial powers over the records of cooperative associations set forth in Section 220(g) of the Act are restricted and cover only those cooperatives or federations required to give notice to the Commission. Such notice pertains only to organizations performing interstate transportation for nonmembers *who are neither farmers, cooperative associations, nor federations thereof.*

Cooperatives or federations which perform nonmember transportation exclusively for farmers, cooperatives, and federations need not file a notice and are not subject to Section 220(g). Thus, the new section requires record keeping from a somewhat broader category of cooperatives or federations than the scope of the Commission's 220(g) inspection powers encompasses. However, the general powers of the Commission in Sections 204(c) and 205(b) of the Act were not derogated by section 220(g).[23] These investigatory sections are not limited

[23] S. Rept. No. 1152, *supra*, at 16.

to organizations that are required to file notice and therefore, the record keeping requirements of the new section have considerable enforcement value even as to those few associations which might not be subject to the powers of Section 220(g).

The real issue now becomes whether these associations should be included in the record keeping regulation when they are exempted from the notice requirements in the underlying statute. We believe they should not. Also, under the new regulation, as written, cooperatives transporting commodities for nonmembers would be included even if the commodities were exempt under other provisions of the Act. The notice and tonnage limitations and the Commission's main visitation privileges over cooperatives are all restricted to a certain class of cooperatives. We do not think an expansion for this one subsection would be consistent with these other sections or with Congressional intent.

A number of comments on this section must be dealt with. Each cooperative used by the Department of Defense must agree to furnish much of the same information which would be required to be kept under the proposed section. In an effort to avoid duplicating Federal agency/shipper evaluations of the propriety of the claimed exemption, it suggests that we add a specific provision providing Commission assistance to shippers which request our evaluation. We do not deem this appropriate or necessary. We must retain the confidentiality of certain information before proceedings are instituted. Our investigations or other actions taken against unlawful agricultural cooperatives, once begun, are public records, and the notice and publication requirements, discussed in the next section, will provide the shipping public with the necessary information and assistance suggested. Naturally, the Bureau will work closely with shippers in informational exchanges leading to the detection of illegal operations.

Yellow Freight System, Inc., and the Teamsters would extend the retention period to 3 and 5 years, respectively. We

find little merit in burdening cooperatives and federations with extra filing and storage problems. Only one year's operations is the relevant measuring period of time, and a review of the records shortly thereafter will provide the information necessary for a determination of the legality of operations. Once a formal investigation has begun we have ample protection against the destruction of records through the issuance of an order to compel their preservation.

Sunkist Growers argues that instead of imposing new legal obligations (with the attendant penalties for failure to comply) the Commission should instead adopt an administrative presumption that the failure to keep adequate records (along with other indicia of a sham operation) will create a prima facie case of an unlawful operation and result in a cease and desist order or suit for enforcement. Without discussing the legal implications of this notion we think it misses the point. More evidence and stronger penalties are needed to facilitate detection and effective enforcement. We must utilize our enforcement resources efficiently and effectively; transportation records are the single most important piece of evidence available to bring a case to a rapid conclusion. We believe Sunkist's fear of indiscriminate prosecution for the mere failure to keep and maintain records is unwarranted. More importantly, we agree with the Bureau that the legitimate cooperative would feel minimal effects from this amended record keeping requirement since it keeps such records in the regular course of its business. On the other hand, a sham cooperative would feel the full impact of the proposed regulation since it keeps few records pertaining to nonmember transportation to escape detection. Of course, legitimate cooperatives may not be recording all the data required, but for them to do so will not be an overly burdensome task. This is corroborated by the large number of such cooperative participants that recognized that purposes and benefits of the proposal and agreed to conform without objection. We conclude that the new subsection on record keeping is reasonable and necessary and should be adopted.

Notice to the Commission—The annual filing and updating requirements of the proposed additions to this section are designed to keep the Commission abreast of changes in the organization or status of agricultural cooperatives. The information called for in the Form BOp 102 is of little value to the Commission if it is not current. The limited resources of the Bureau are wasted in attempted visits or notice servings on organizations which have moved or made major personnel changes. By requiring the annual filing of notice and the prompt (within 15 days) notification of any changes in the information concerning officers, directors, and the location of records, the Commission is assured that current information is available.

The updating requirement itself results in ample notice and precludes the need for a listing or discussion of significant changes from the prior years' report as suggested by General Mills. We do not want to burden cooperatives with requirements that are redundant or of little added benefit. To a certain extent the yearly filing is unnecessary in light of the strict updating requirement. But each filing serves a purpose since the latter does not pertain to all of the information required to be reported in the Form BOp 102. However, the comments of Northwest Agricultural Cooperative, Inc., are well taken in bringing to our attention (1) the multiple filings required of any association whose annual meeting does not coincide with the calendar year and (2) the difficulty of meeting a 15 day deadline. It makes more sense to tie the annual filing to the annual meeting of the membership when new operations are assessed and new officers and directors usually elected (or appointed soon thereafter). We will allow 30 days from this date for filing.

Some of the agricultural cooperative oriented interests complain that the 15 day notification period for changes is too short. They suggest that 30 days is more reasonable, and though none has shown an adequate reason, hardship, or justification for not being able to comply with the shorter

period, a 30-day period is more appropriate so as not to create a conflict with the annual filing requirement. They also contend that the Commission may not invoke the harsh penalty of voiding and rescinding a notice already on file for failing to inform the Commission of changes. The proposal's rationale—that the notice on file does not constitute adequate notice of the description of the entity which intends to perform the transportation—has merit but may not be appropriate where minor officers or record locations are the only changes and could lead to uncertainty. The law only requires a complete and proper filing before initiating operations. Instead of requiring recision we will achieve the same deterrent effect and underscore our concern for the lack of information by adding the following language to the notice form (the first sentence of which will appear in the regulation):

> THE INFORMATION REQUESTED IS OF A CONTINUING NATURE AND ANY CHANGES IN THE INFORMATION CONCERNING OFFICERS, DIRECTORS, AND LOCATION OF TRANSPORTATION RECORDS IN THE NOTICE ON FILE SHALL BE BROUGHT TO THE COMMISSION'S ATTENTION BY THE FILING OF A SUPPLEMENTAL FORM BOp 102 WITHIN 30 DAYS OF SUCH CHANGE. THE FAILURE TO INFORM THE COMMISSION OF SUCH CHANGES MAY SUBJECT THE ASSOCIATION OR FEDERATION AND ITS OFFICERS AND DIRECTORS TO THE PENALTIES PRESCRIBED IN 18 U.S.C. § 1001.

The provisions for the publication of these filings in the Federal Register are heralded as welcome relief to the shipper's dilemma described earlier in this report. This will provide appropriate notice to interested carrier and shipper groups (including government acting in such capacity) and will invite the submission of information that could have a bearing upon

the propriety of the applicable filing. Such publication, however, does not completely solve the shipper's problem because notice can easily be missed. This is especially true since the annual meetings of cooperatives may vary which would mean that all publications would not be simultaneous. Therefore, we will also adopt General Mills' idea of a central file for this information in Washington. The information could easily be put on microfilm, as is now the case with many Commission dockets, and be made available to field offices and for public inspection.

NARUC urges that each cooperative filing a BOp 102 with the Commission serve a copy upon the agency of each State in or through which the exempt transportation is to be performed. We rejected this requirement when considered in our original *Implementation of P. L. 90-433* proceeding and we have not changed our minds. The wording of the statute defies imposition of such a requirement. The purpose—Federal/State cooperation—is now accomplished by the requirement for filing a sufficient number of copies of the notice for distribution to the appropriate State bodies and by the requirement that a copy of the notice be kept on each truck or tractor engaged in the subject transportation. The first requirement has been deleted from the proposed form without explanation. Whether this was done intentionally or by mistake, the microfilming would preclude the necessity of the submission of numerous copies of the notice.

The proposed modification also provides for a revised Form BOp 102 containing the business addresses and principal occupation of the cooperative's officers and directors. Such information is not required by the present form. The Railroad's draft form, among other items, includes (1) a notation of management affiliation with other cooperatives required to file notice; and (2) the business address of the cooperative. The first item is relevant in detecting persons who habitually set up shams behind the facade of dummy officers and directors; the second is valuable in case the business address of the cooperative differs from the principal mailing address (which may be a

post office box). The Illinois Department of Agriculture submits that the new form lacks information as to the type of cooperative or federation filing notice. We believe these items to be fundamental and germane; they will be incorporated into our revised form. All these additions will expedite initial verification of the legitimacy of the filing cooperative. Also, further investigations into its operations will not be stalled by unaccessible officers and directors who hold the authority to permit inspection of records. In the new form, certification will now be required by three of the principal officers rather than one. This procedure has been formalized to require notarization.

NARUC and the carrier interests advocate a variety of other questions expending the information called for in the notice form. A few related suggestions involve submission of physical evidence and compliance with other affirmative action. These include: (1) a list of the members, qualifications, meetings, and other membership data, (2) vehicle descriptions, and power unit display of the name and location of cooperatives or the name and address of owner and driver, (3) a copy of relevant lease agreements and that such be kept in the vehicle, (4) an indication of how a nonmember move is "incidental" and that such be kept in the vehicle making such a move, (5) principal employee data, (6) expanded director and stock data, (7) control data, (8) tonnage and revenue data for all categories for year previous to filing, and (9) certification pursuant to board or member resolution and attached copy. Most of this information appears relevant to the filing organization's qualifications to operate as an agricultural cooperative or federation within the limitations of the exemption.

Although these suggested additions would be useful in alerting the Commission to potential shams or operations beyond the scope of the exemption we do not deem it appropriate or consistent with the Congressional purpose of the notice to demand the production of such data in the notice filing. A great deal of this information will now be accessible and subject to Commission scrutiny through police powers discussed in this

report. This added data is no substitute for the effective investigation and enforcement essential to halting illegal operations. We applaud the notion of requiring alleged cooperatives and federations to divulge their qualifications prior to operating under the exemption and to furnish proof of past operations within the established bounds before continuing to operate under it. But, we cannot do so without a clear Congressional mandate.

We conclude that the changes to Section 1047.23 outlined above are reasonable and necessary. We similarly conclude that, in accordance with what has been said above, the revised content of the Notice Form BOp 102 set forth in the attached notice is reasonable and necessary and should be adopted.

OTHER PROPOSALS

A number of the participants in this proceeding made proposals which do not fit neatly into the sections and subsections as they now exist. The Pacific Northwest Traffic League, the Transportation Association of America, and others recommend that cooperatives and federations be required to file quarterly statements and tonnage reports with the Commission. This measure is noteworthy, but in view of what has already been said in regard to record keeping, police powers, and notice, it stands on legally weak grounds. Section 220(a) of the Act authorizes the Commission "to require annual, periodical, or special reports from all motor carriers, brokers, lessors, and associations (as defined in this section)." It can be argued that cooperatives and federations operating under the Section 203(b)(5) exemption are neither "motor carriers" nor "associations".[24]

[24] "Motor carriers" include contract and common carriers as defined in Sections 203(a)(14)(15) and (16); an "association" as it pertains to this section, defined in Section 220(c) "means an association or organization maintained by or in the interest of any group of motor carriers or brokers subject to this part which performs any service, or engages in any activities in connection with any traffic, transportation, or facilities subject to this Act."

Regardless of the Commission's power to promulgate such a rule, it may present more practical problems than it solves. It attempts to expose as quickly as possible the cooperative which fails to comply with the tonnage restrictions. Often, a sham cooperative will operate for a short time, be dissolved and then be reformed under a new name. However, the statutory tonnage limitations are based on percentages for a full year period. Quarterly figures may indicate a trend, but they also may spark unnecessary, expensive, and premature investigatory action. Flooding the Commission with numerous reports will not provide a quick solution to a practice that exists and thrives on the lack of enforcement resources and on bureaucratic lag. This may even aggravate the problem. The stricter disclosures involving information as to management which we have instituted will help identify the principals of such schemes, but only concentrated and concerted enforcement based on conclusive evidence will bring those responsible to justice.

The Teamsters recommend that the Commission require reports from cooperative associations or federations (and brokers of such services) which do *not* meet the definition or operate within the guidelines of section 203(b)(5). It is not disputed that if the cooperative (or broker) fails to meet the AMA definition, it is subject to the reporting requirements of section 220(a) as well as the full economic regulation of the Commission. But once this is ascertained, there is no need to breakdown tonnage and revenue in a report since no significant purpose would be served. The question of entitlement to the exemption would already have been determined.

The shipper and carrier interests put forth what we consider to be an effective plan to combat the unlawful transportation of regulated traffic by agricultural cooperatives. Their analyses pay particular attention to the deficiencies inherent in the present system of enforcement and in the system of justice in general. The burden imposed by various legal rules and procedures, the rights of defendants, and the time and expense of enforcement actions give a decided advantage to the bogus cooperative once it has commenced operations. The continued

vitality of these organizations confirms the analyses. Such vitality is demonstrated by the surfacing of these organizations under different names after the institution of enforcement action. They conclude that the best way to stop the sham cooperative is to prevent it from getting started. This means screening potential claimants of the exemption and certifying that they are legitimate before allowing them to utilize the exemption.

It does make sense to investigate matters before, rather than after operations are commenced. It would be less complex, less costly, and less time consuming. That the task could even be delegated to the Department of Agriculture has been suggested.

Requiring formal certification as a prerequisite to performing operations under the exemption is promising but lacking a legal or theoretical basis. We pointed out earlier the reasons why the Notice Form could not be the vehicle through which this might be accomplished. We could consider the promulgation of a new regulation for this purpose, but we believe that such a course of action would be totally inconsistent with the basic purpose and idea of the exemption as we traced it in the preface to this report. Commission approval of the Congressionally required notice of intent to perform transportation for certain nonmembers is not a precondition to the conduct of such transportation. Therefore, we can hardly reconcile such stricter conditions with the broad purpose of the exemption.

One of the regulated carriers argues that since it is required to spend enormous sums of money and time procuring operating rights, it is not too much to ask that agricultural cooperatives delay initiating transportation operations until granted approval. This raises a crucial issue. If the "exemption" means anything, it has to be distinguishable from regulation. As layer upon layer of regulations are promulgated, the line between the two becomes finer and finer and eventually vanishes completely. At that point the legislative intent has been thwarted. We cannot allow this to happen. Our actions in this proceeding

will be limited in scope to that which we are empowered to do within Congressional constraints.

Moreover, we already possess the power to proceed against sham cooperatives before they begin to cut into the traffic of the regulated industry to any great degree. Proper use of our enforcement powers can achieve almost the same result as certification. Once a Form BOp 102 has been filed, we can launch an immediate investigation of the alleged cooperative to determine whether it qualifies for the exemption. Time would not be wasted awaiting the year period required for statistical analysis of compliance with the tonnage limitations because such analysis would only be taken after an affirmative finding on the threshold question. If the primary finding is negative, an appropriate cease and desist order can be obtained prior to the commencement of substantial operations.

CONCLUSION

We have carefully considered in this proceeding the proposed and suggested modifications to the existing regulations dealing with the section 203(b)(5) exemption for motor vehicles controlled and operated by an agricultural cooperative association or by a federation of such associations. We have reached our conclusions through critical analysis of existing law and the purposes to be served by the proposed amendments.

The means by which the proposed modifications attempted to fulfill the first objective—to define more clearly the exemption—not only failed to achieve that end but did so at the expense of legitimate agricultural cooperative activities. Generally, the proposed definitional changes were contrary to the intent and meaning of the statutory foundation and tended to confuse rather than clarify. The efforts to protect regulated carriers from an increasing diversion of their traffic by unlawful operators would have been exacted at a high price without any clear indication of success. The promulgation of such regulations would have seriously limited the exempt operations conducted by legitimate agricultural cooperatives while doing

little to clarify ambiguities or to stop the sham cooperative which is already operating in violation of present laws and Commission regulations.

In contrast, the trip-lease prohibition and the new and revised record keeping and notice provisions provide effective means for strengthening the Commission's enforcement arm without unduly affecting the rights of legitimate cooperative associations. The first proscribes a practice prevalent among sham operators and of dubious or no value to legitimate cooperatives. The others require cooperative associations to maintain meaningful transportation records and to keep the Commission informed of their current status. They are the tools necessary to enable the Commission to perform the two functions essential to curbing unlawful transportation activities by cooperatives: (1) determining the bona fides of claimants to the exemption and (2) monitoring observance of the tonnage limitations.

No amount of additional rules and regulations will insure elimination of the operations of those persons or entities which choose to provide for-hire transportation in violation of the law. However, the regulations adopted in this proceeding will establish a more workable framework for enforcement and will strengthen the Commission's ability to administer and enforce the law. The Commission has already embarked on a major crackdown against sham agricultural cooperative associations; the regulations adopted herein will accelerate the pace and improve the effectiveness of that effort.

FINDINGS

We find that Part 1047 of Subchapter A, Chapter X of Title 49 of the Code of Federal Regulations requires modification by the respective changes in sections 1047.20 through 1047.23 as set forth in the attached notice; and that such rules and regulations are reasonable and necessary and should be prescribed.

An appropriate order will be entered.

ORDER

TITLE 49—TRANSPORTATION
CHAPTER X—INTERSTATE COMMERCE COMMISSION
SUBCHAPTER A—GENERAL RULES AND REGULATIONS
PART 1047—EXEMPTION

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 22nd day of December, 1977.

EX PARTE NO. MC-75 (SUB-NO. 1)

AGRICULTURAL COOPERATIVE TRANSPORTATION EXEMPTION
(Modification of Regulations)

By notice and order entered November 18, 1976, this Commission, on its own motion, instituted a rulemaking proceeding (1) to define more clearly the exemption from economic regulation accorded motor vehicles controlled and operated by agricultural cooperative associations or federations thereof and (2) to formulate new and revised requirements concerning record keeping and notice to the Commission respecting certain transportation provided in such motor vehicles. Investigation of the matters and things involved in this proceeding has been made and the Commission has made and filed its report herein containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof.

It is ordered, (1) That Subchapter A of Chapter X of Title 49 of the code of Federal Regulations is amended by adding a new subsection 1047.22(b) as set forth in the attached notice, and by modifying sections 1047.20(a), 1047.21, 1047.22, and 1047.23(a) as set forth in the attached notice;

(2) That this order shall become effective 60 days from the date of publication in the Federal Register of the notice of the adoption of these regulations, and shall remain in effect until modified or revoked in whole or in part by further order of the Commission;

(3) That a copy of this report and order be served upon the United States General Accounting Office for its approval of the changes to the Form BOp 102 which has been modified herein; and

(4) That notice of this order shall be given to the general public by depositing a copy thereof in the Office of the Secretary of the Commission at Washington, D.C., and by filing a copy of the attached notice with the Director, Office of the Federal Register. (49 U.S.C. 302, 303, 304, 305, 311, and 320, and 5 U.S.C. 553 and 559).

By the Commission.

(SEAL) H. G. HOMME, JR.,
Acting Secretary.

TITLE 49—TRANSPORTATION
CHAPTER X—INTERSTATE COMMERCE COMMISSION
SUBCHAPTER A—GENERAL RULES AND REGULATIONS
PART 1047—EXEMPTIONS

EX PARTE NO. MC-75 (SUB-NO. 1)

AGRICULTURAL COOPERATIVE TRANSPORTATION EXEMPTION
(Modification of Regulations)

Regulations promulgated dealing with the exemption from economic regulation which section 203(b)(5) of the act, as

amended, accords to motor vehicles controlled and operated by an agricultural cooperative association or by a federation of such associations.

AGENCY: Interstate Commerce Commission

ACTION: Final reguiations

SUMMARY: The proposed definitional changes to the exemption are not adopted as (1) they fail to achieve their objective of clarification, and (2) they impinge upon the operations of legitimate agricultural cooperatives. The one-way trip-leasing of vehicles to agricultural cooperatives for non member-nonfarm transportation is expressly prohibited by regulation. A new subsection is added to require cooperatives and federations to keep certain transportation records. The Form BOp 102 and notice requirement is amended so as to require (1) prompt notification of changes regarding officers, directors, and the location of transportation records, (2) penalties for failure to comply with (1), (3) publication in the Federal Register and central filing, and (4) rejection of incomplete or improperly notarized forms.

EFFECTIVE DATE: 60 days from publication of this notice in the Federal Register.

FOR FURTHER INFORMATION CONTACT:

Michael Erenberg
Assistant Deputy Director
Office of Proceedings
Section of Operating Rights
Interstate Commerce Commission
Washington, D.C. 20423
(202-275-7292)

APPENDIX C

INTERSTATE COMMERCE COMMISSION

EX PARTE NO. MC-75 (Sub-No. 1)

AGRICULTURAL COOPERATIVE TRANSPORTATION EXEMPTION (MODIFICATION OF REGULATIONS)

(service date May 16, 1978)

SUMMARY

Upon petition for administrative review, consideration being given to further views of parties and others desiring to comment on the modified regulations, petitions granted to the extent seeking clarification of rule regarding one-way trip-leasing, but for the most part reconsideration and other relief denied, and the regulations adopted in the report and order of December 22, 1977, as modified by this decision, scheduled to become effective 60 days from the date of publication in the Federal Register of a Notice of the modifications made in this decision.

DECISION OF THE COMMISSION ON RECONSIDERATION BY THE COMMISSION:

BACKGROUND AND PARTIES

The purposes and procedural history of this rulemaking proceeding are fully explained in our prior report and order of December 22, 1977, referred to throughout this decision as the Report. The Report adopted modifications to the regulations dealing with the agricultural cooperative transportation exemption. These final regulations were to become effective on March 20, 1978.

Administrative appeals to the order entered in this proceeding on December 22, 1977 (served January 10, 1978) were filed on February 9, 1978 by Agricultural Transportation Alliance (Alliance) and jointly by Heartland Farm Lines, Inc., Sandmountain Farmers Inc., and Tillamook Growers Cooperative, Inc. (collectively referred to as Heartland). Replies to the petitions seeking administrative review were filed on March 1, 1978 by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Teamsters), jointly by American Trucking Associations, Inc., and Committee on Transportation Practices, Inc., including National Motor Freight Traffic Association, Inc., Regular Common Carrier Conference and Common Carrier Conference—Irregular Route and jointly by Traffic Executive Association—Eastern Railroads, Western Railroad Traffic Association, Southern Freight Association, and Association of American Railroads (collectively referred to as the Railroads). By order of March 1, 1978, the Commission extended for 60 days the effective date of the regulations in order to give full consideration to the appeals and replies of the parties. The evidence and arguments of the petitioners and replicants will be discussed here in detail. Repetition of citations and matters adequately covered in our Report have been kept to a minimum.

PROCEDURAL MATTERS

The Heartland petition initially attacks the validity of the regulations in general as violative of certain procedural requirements. In particular it contends that (1) the notice of proposed rulemaking did not give adequate notice of the final regulations, (2) interested persons were not given an adequate opportunity to participate in the rulemaking, (3) the Commission failed to give an explanation of the need for the rules, (4) the Commission did not respond to significant comments submitted by participants, (5) the Commission failed to consider reasonable alternatives to the final regulations, and (6) the

promulgation was not in compliance with the National Environmental Policy Act of 1969 (NEPA).

The notice requirements are governed by section 553(b)(3) of the Administrative Procedure Act (APA). The pertinent portion of that section provides that the published notice include "either the terms or substance of the proposed rule or a description of the subjects and issues involved." The notice in this proceeding contained a statement of the overall purpose of the proceeding, the reasons behind the institution of the proceeding, the specific objectives to be accomplished, the proposed regulations, and a lengthy justification for each regulation. The notice provided both the substance of the regulations and a comprehensive discussion of the subjects and issues involved. As such it met the requirements of the APA. It put the public on notice of the regulations and invited comment.

The fact that the final regulations do not correspond, word for word, to the proposed rules does not necessitate publication of another notice. The APA does not require advance publication of every precise proposal which an agency ultimately may adopt as a rule, *California Citizen Band Association* v. *United States,* 375 F.2d 43, 48 (9th Cir. 1967), *cert. denied* 389 U.S. 844, and the rules adopted need not be identical to the proposed version of the rule, *Chrysler Corporation* v. *Department of Transportation,* 515 F.2d 1053, 1061 (6th Cir. 1975).

The comments of the participants in the proceeding brought to light relevant facts which called for minor changes or refinements of the proposed rules. However, the final regulations come well within the scope of the proposed rules and notice; they do not embrace any subjects that were not described in the notice. In fact, in most instances the final regulations were more narrowly drafted than those proposed, or completely rejected proposed changes in existing rules. In any event petitioners were fairly advised of exactly what the Commission proposed to do and were given adequate time and opportunity to formulate and to present objections.

In light of what has been said above we dismiss Heartland's unsupported allegations of the Commission's failure to provide an explanation of the need for the rules and of its failure to consider other views and alternatives. The Report offers an in depth study of the agricultural cooperative transportation exemption and a detailed analysis of the views, arguments, and proposals of the participants to the proceeding, many of which have been incorporated in the final regulations.

We are of the opinion that the promulgation of the regulations does not violate the provisions of NEPA and related rules of the Commission. It is our belief, and the threshold determination of the Commission, that the subject regulations do not constitute a major federal action significantly affecting the quality of the human environment. Under these circumstances no environmental impact statement (EIS) is required. We point out that the rulemaking does not present the potential for significant environmental impact contemplated under 49 CFR section 1108.8(d) and since it does not affect "carriers", as defined in Part II of the Interstate Commerce Act (referred to as the Act)[1] it does not present any environmental issued falling within the scope of 49 CFR section 1108.9. However, although we discussed environmental issues in various portions of our Report we neglected to make a formal negative environmental finding. This well be remedied here.

The environmental arguments of Heartland are more specifically directed at the rule governing one-way trip-leasing of equipment. The entire petition of the Alliance addresses this same rule exclusively and makes similar environmental arguments. We will take up next all the issues involved in this portion of the regulations including the environmental aspects.

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[1] Section 203(a)(16) of the Act defines "motor carriers" as including only a regulated motor contract and motor common carrier; the term does not include an agricultural cooperative operating under the 203(b)(5) exemption.

ONE-WAY TRIP-LEASING OF EQUIPMENT TO A COOPERATIVE FOR CERTAIN NONMEMBER TRANSPORTATION.

Certain nonfarm-nonmember traffic handled by a cooperative is exempt from regulation (within limitations). As stated in our prior reports dealing with the agricultural cooperative transportation exemption, section 203(b)(5) of the Act was amended in 1968 by Public Law 90-433 in order to place limits on the exempt cooperative transportation of this nonfarm-related nonmember traffic. Congress imposed a 15 percent tonnage limitation and the "incidental and necessary" test. Our 1969 regulations, 49 CFR 1047.21(a), setting forth the criteria for meeting the later test, define the latter requirement as transportation performed

> . . . with the same trucks or tractors employed in a prior or subsequent trip in the primary transportation operation of he cooprative association or federation, that it is not economically feasible to operate the trucks or tractors empty on return trips (outbound trips in cases where the primary transportation operation is inbound to the association or federation), and that the additional income obtained from such transportation is necessary to make the primary transportation operation financially practicable.

Our modification in this proceeding added a single sentence to the regulation providing that certain transportation performed by a cooperative through the use of one-way trip-leased vehicles is not incidental and necessary. By this addition we primarily made explicit what was already implied in the present regulations, namely, that such one-way trip-leasing would not meet both the "incidental and necessary" and "controlled and operated" tests of the section 203(b)(5) exemption. We stated that we could not conjure up such a one-way trip-lease situation which would satisfy the statutory criteria and related regulations. We pointed out, however, that the explicit language would greatly enhance and simplify

enforcement of the exemption and would strike at common practices of "sham" cooperatives in conducting unlawful transportation and diverting traffic from regulated carriers.

Petitioners argue that the modification is ambiguous and subject to improper interpretation. Among other things they complain that the modification can be interpreted as prohibiting agricultural cooperatives from leasing their own vehicles to carriers, and that our regulation can be construed to prohibit one-way trip-leasing for member or nonmember farmer and cooperative movements.[2] We thoroughly discussed these and other issues in our Report, but we will here further clarify the sentence to be added to the present regulation in order to avoid any possible misinterpretations. The changes are set out in the attached notice.

Petitioners also question the meaning of the term "vehicles." We meant to define this term by reference to the preceding sentence of the present regulation. This sentence defines "incidental and necessary" as meaning nonmember transportation performed with the same "trucks or tractors" employed in a prior or subsequent primary transportation operation. The Alliance takes the position that the present regulation was formulated in response to the cooperative practice of using trailers interchangeably and operating more trailers than tractors, and that it has no application to trip leasing. We note that the economic rationale for limiting the test to cooperative owned power equipment (not trailers) applies equally to one-way trip-leasing. In the rare instance

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[2] Petitioners also tend to confuse a collateral issue when making the argument that the Commission can not disqualify one-way trip-leases for certain nonmember-nonfarm traffic while apparently not doing so for member or nonmember farmer or cooperative traffic. The critical difference between the two types of traffic is that the former category, unlike the latter, is the only one subject to the "incidental and necessary" test imposed by statute. The Commission did not make this distinction, Congress did. Inasmuch as a one-way trip-lease is incapable of meeting that and other statutory tests such lease arrangement cannot be employed in handling certain nonmember-nonfarm transportation.

where a cooperative wishes to trip-lease only a trailer, one-way, for a nonmember move preceding[3] or succeeding[4] a member move, this should not be prohibited. The trip-lease would help offset an economic loss otherwise encountered if the power unit were to run empty, that is, without a loaded trailer. On the other hand the one-way trip-lease of a power unit (or combination) to haul nonmember-nonfarm traffic bears little or no direct relation to the economics of preceding or succeeding member moves performed with *other* power equipment which must itself return in an operationally feasible manner. Furthermore, the trip-leasing of such power equipment with drivers, for example, leasing from owner operators, makes compliance with the "control and operated" requirement of the statutory exemption exceedingly difficult, if not impossible, to meet.[5] We will correct any possible ambiguity as to the type of "vehicles" that may or may not be trip-leased one-way by explicit language in the regulation. This change appears in the attached notice.

Petitioners believe that the "one-way trip-lease" is not easily distinguishable from a legitimate "two-way trip-lease". We disagree. If a cooperative leases equipment for a "two-way" or "round-trip" movement the nonfarm-nonmember portion of the operation can qualify as being "incidental and necessary" to the primary transportation operation of the cooperative since the same truck or tractor was used on both legs of the operation and nonmember move may offset an economic loss otherwise encountered in an empty truck or tractor which has participated in an outbound or inbound trip for a member. On the other hand, a one-way trip-lease, by

[3] For example, in order to move power equipment to the location of a previously spotted trailer.

[4] For example, after dropping off a trailer to be spotted.

[5] See the dual factor test established in *Machinery Haulers Assn. v. Agricultural Commodity Serv.*, 86 M.C.C. 5, 28 (1961) set forth in Report p. 38.

definition, does not involve use of the same vehicle on both the outbound and inbound movements and will not offset a loss otherwise encountered by equipment participating in an outbound member move.[6]

The object of the 203(b)(5) exemption, as amended, permitting agricultural cooperatives to transport a limited amount of nonmember-nonfarm traffic without authority from the Commission, is merely to enable them to round out their transportation operation utilizing the same power equipment employed in their primary transportation movements in the opposite direction. One-way trip-leasing does not fit into this scheme since the equipment used for the primary movement must still move in the direction of the trip-lease; the trip-lease does not serve the purpose of the "incidental and necessary" exemption.

The Alliance seeks to delete the one-way trip-lease language by attempting to broaden the statutory "incidental and necessary" standard beyond that contemplated in the statute and now contained in the current regulations. Its basic assumptions, which we do not dispute, are that (1) cooperative transportation, whether performed for members or nonmembers, is rarely, if ever perfectly balanced one-for-one so that for every outbound load there is always a return loan and (2) nonmember traffic is important to the economical and

[6] The Alliance poses a trip-lease situation where there is (1) a primary member move outbound, then (2) a trip lease for a secondary member move to a destination intermediate to the vehicle's home base, and then (3) another trip-lease for the same equipment for a nonmember move the remainder of the way to the vehicle's domicile. The nonmember move might be incidental and necessary to the preceding secondary member move so as to permit return of the equipment to the origin of the secondary member move. It is not, however, incidental and necessary to the primary move so as to authorize return to the home base. This is because the same equipment has not been utilized in the primary and nonmember movements and the one-way trip-lease does not offset any economic loss otherwise encountered in empty equipment which has participated in a move in the opposite direction.

efficient transportation of member traffic. From these premises it postulates that in order to protect the nonmember backhaul traffic it receives from a shipper to balance its member transportation a cooperative must, for legitimate business reasons, accept additional traffic from such shipper [assuming such traffic does not exceed the tonnage limitation of Section 203(b)(5)]. Such additional traffic, the Alliance argues, may not balance out its member transportation and may require movement of shipments of the cooperative which are *wholly unrelated* to a prior or subsequent movement by a member. It further states that if the nonmember shipper requires such service at a time when the cooperative does not have sufficient equipment available to handle it, a primary manner by which the cooperative performs such service is by means of the one-way trip-leasing of vehicles from another entity. The Alliance concludes that this one-way trip-leasing which enables a cooperative to retain its backhaul traffic and, in turn, to transport efficiently member traffic, is therefore "incidental to a cooperative's primary transportation operation and necessary for its effective performance."

While we sympathize with the plight of cooperatives in this regard, we do not agree that this practice comports with the statutory exemption accorded cooperatives. Such one-way trip-leasing described above does not meet the "incidental and necessary" test, as contemplated in Public Law 90-433 and is outside the scope of the exemption from regulation.

In our Report we traced the legislative history of federal statutes conferring special status on agricultural cooperatives, particularly in relation to transportation. We reviewed the purposes of such legislation and, as indicated in the Railroads' reply, the favorable treatment was intended to foster farm-related operations for the benefit of the farmer members. It was not intended that cooperative enter the general trucking business. The enactment of the 1968 amendment to the agricultural cooperative transportation exemption rectified any judicial misconstructions of the exemption pertaining to

nonfarm-nonmember traffic by the imposition of the tonnage limitation and incidental and necessary test. With respect to the latter the legislative history makes clear the Congressional intent that a cooperative's for-hire transportation for nonmembers have the same direct relationship to its farm-related transportation as that found in the facts of the case of *Northwest Agricultural Cooperative Association* v. *Interstate Commerce Commission*, 350 F.2d 252 (1965), *cert. denied*, 382 U.S. 1101.[7] The facts were specifically set forth in the report of the Senate committee considering the legislation and reiterated in our initial report promulgating the regulations in this area:

> . . . Northwest's transportation of non-farm products and supplies was incidental and necessary to its farm-related transportation both in character and in amount—incidental because *limited to otherwise empty trucks returning from hauling member farm products to market*, and producing a small return in proportion to Northwest's income from trucking farm products and farm supplies; necessary because it is not economically feasible to operate the trucks *empty on return trips* and because the additional income obtained is no more than that required to render performance of the cooperative's primary farm transportation service financially practicable (emphasis added).

Our initial regulations on the subject followed these standards and the addition promulgated in this proceeding, concerning one-way trip-leasing, is likewise consistent with the legislative history of the statute. For the reasons stated earlier such one-way trip-leasing does not meet the terms of our initial regulations. As noted the Alliance posits that these regulations never excluded such trip-leasing. We are of the opinion that 1968 amended statutory exemption never comprehended such trip-leasing to fall within the incidental and necessary language. Public Law 90-433 was aimed at overbroad interpretation of

[7] Senate Report No. 1152 (90 Congress, 2nd Session), pp. 12-13.

the exemption. It prevented application of the exemption to nonmember-nonfarm transportation which affected the economics of the cooperative but was unrelated to the farmer or cooperative traffic which forms the basis for the regulatory exemption. *Such unrelated one-way trip-leasing practices described by petitioners do not fall within the scope and meaning of the 203(b)(5) exemption or our present regulations.*

In view of what has been said, it should be manifest that our one-way trip-lease provision does not change existing law or alter the scope of the exemption. We have only made it clear that certain one-way trip-leases are not exempt from regulation and may otherwise be unlawful. As such the subject addition to section 1047.21(a) does not constitute a major federal action significantly affecting the quality of the human environment. Nor does it violate the Energy Policy and Conservation Act ("EPACA"), Public Law 94-163, and does not represent major regulatory action so as to require an in depth statement of the energy implications of our action.

Our actions will not result in an inefficient increase in fuel consumption and empty backhauls. The nonmember-nonfarm traffic formerly handled by agricultural cooperatives will be handled by authorized carriers who might otherwise be forced to travel empty miles because their traffic has been diverted by cooperatives using leased equipment or by sham cooperatives conducting unlawful operations. The statistics cited by the Alliance regarding regulated carrier empty vehicle mileage tend to confirm our conclusion. Legitimate carriers or owner-operators who have been trip-leasing equipment to agricultural cooperatives can transport exempt commodities or trip-lease to authorized carriers thereby avoiding backhaul problems for them. Therefore, the allegations of wasted fuel resources resulting from empty backhauls are overstated. When the total transportation system is considered there would be no net change in the consumption of such resources. In fact, by making clear the illegality of certain trip-leases our action will have the effect of terminating the unlawful diversion of for-hire

traffic by sham cooperatives, returning it to regulated carriers, thereby reducing their empty mileage and promoting fuel efficiency.

Petitioners' final theory in attempting to delete the trip-lease provision added to section 1047.21(a) is that Section 204(f) of the Act proscribes our action. We have tried to convey that the subject one-way trip-leases do not meet the "incidental and necessary" and/or the "controlled and operated" tests of the 203(b)(5) exemption. Section 204(f) cannot remedy or exempt such practices from the provisions of the Act.

For a number of reasons Section 204(f) is not applicable to our modification of the regulation. The pertinent portion of that section reads as follows:

> (f) Nothing in this part shall be construed to authorize the Commission to regulate the *duration* of any such lease, contract, or other arrangement for the use of any motor vehicle, with driver, *or the amount of compensation to be paid for such use*—(1) where the motor vehicle so to be used *is that of a farmer or of a cooperative association or a federation of cooperative associations,* as specified in section 203(b)(4a) or (5), . . . *and such motor vehicle is to be used by the motor carrier* in a single movement or in one or more of a series of movements, loaded or empty, in the general direction of the general area in which such motor vehicle is based. . . (emphasis added).

As we said in our Report we would neither be limiting the *duration* of any lease nor be limiting the compensation to be paid. More importantly, section 204(f) does not apply to the situation where the cooperative is the leasee of the equipment but rather only applies where it is the lessor. The language plainly covers the case where the vehicle is that *of* a cooperative and is to be used *by* the motor carrier [defined in section 203(16) of the Act as a contract and common carrier]. Hence,

section 204(f) is not directed at the type of leasing covered in our modification and does not prohibit us from promulgating the rule.

RECORD KEEPING

Heartland attacks the new record keeping rule, 49 CFR 1047.22(b), on much the same grounds as those raised by other participants to this proceeding and fully discussed in our Report. The main thrust of Heartland's objections concerns the Commission's authority to require maintenance of records regarding transportation exempt from regulation and the movement of exempt commodities. What Heartland's assertions disregard is the fact that Congress specifically and intentionally placed limits on the type and amount of traffic which qualifies for the agricultural cooperative exemption and records must be kept in order for us to determine whether the cooperative has exceeded the statutory limits of Section 203(b)(5).

Sham cooperatives have abused the exemption and have taken refuge in the lack of record keeping requirements. Without some minimal informational requirements the Commission finds it difficult to make a determination of the propriety of transportation claimed under the exemption.

In promulgating this rule the Commission is merely exercising its broad authority contained in section 204(a)(6) of the Act "to administer, execute and enforce all provisions" of part II of the Act, "and to prescribe rules, regulations, and procedures for such administration." All of the items of information required to be maintained are reasonably related to the Commission's statutory enforcement powers. Such information will reveal whether equipment is "controlled and operated" by the cooperative, whether certain nonmember non-farm traffic is "incidental and necessary" and within the percentage limitations of the statute. Contrary to Heartland's allegation, the Commission is not improperly regulating exempt transportation. It is only requiring that those persons or entities who

claim the benefit of the 203(b)(5) exemption and who haul certain nonmember nonfarm traffic keep records to document compliance with the limitations of the exemption.

The enactment of Section 220(g) of the Act in 1968 gave the Commission the explicit power to obtain the information necessary to police operations conducted under the 203(b)(5) exemption. The subject rule is a necessary complement to the Commission's inspection powers over cooperative transportation records; without the authority to prescribe the keeping of such information the investigatory powers to determine compliance have little practical value. The record keeping requirements are reasonable, relevant, and a proper means of facilitating enforcement of the exemption.

The Heartland petition contends that in the Commission's zeal to detect sham cooperatives it placed an undue burden on bona fide cooperatives. In our Report we stated that the rule would not have any significant impact on bona fide cooperatives who keep such records in the ordinary course of business. This was based on the response of the numerous cooperative related interests that participated in the proceeding. Most had no objection to the record keeping requirements and recognized the adverse effect it would have on shams. None of these participants filed for administrative review of that provision.

This regulation does not contravene the policies incorporated in the Agricultural Marketing Act, (AMA) as Heartland argues. On the contrary it insures compliance with the limitations imposed on cooperative transportation and helps eliminate the unlawful operations and illegal operators never intended to benefit from the legislation.

NOTICE AND FORM OF NOTICE

Heartland raises a number of objections to the final regulations amending 49 CFR section 1047.23 and the Form BOp 102. It first argues that the language of the 203(b)(5)

exemption, requiring agricultural cooperatives to notify the Commission of its intent to perform transportation for certain nonmembers prior to the commencement of such transportation, prohibits the Commission from promulgating rules requiring periodic updating of the information called for in the BOp form notice. We do not share this strict and narrow construction given the language of the statute. The data contained in an original notice filed pursuant to the statute is often obsolete or meaningless within a short period of time. An agricultural cooperative may change is organizational makeup, its personnel, its location, the location of its transportation records, the persons having custody or authority to permit inspections of transportation records, or the entire nature of their operations. Although the name of the cooperative may have been retained a notice filed under such name would serve no useful purpose in identifying the cooperative, its domicile, its officers and directors, and the situs of its transportation records and those having custody or control over them.

In the past sham cooperatives have frustrated the efforts of enforcement personnel of the Commission from making field contact or serving notices because of their failure to notify the Commission of changes in their organization. The new regulations requiring filings within a reasonable period of time after the cooperative's annual meeting will insure prompt notification of organizational status, and the requirement for continual updating of specified changes concerning officers, directors, and the location of transportation records prevents the abuses practiced by sham cooperatives which were not keeping such information current with the Commission.

The Interstate Commerce Act does not preclude the Commission from requiring an update of information in a notice after the original filing. On the contrary, in order for the Commission properly to carry out its enforcement responsibilities under the Act it must stay abreast of changes in the organization of agricultural cooperatives. The promulgation of

the regulations in this area fall within the Commission's section 204(a)(6) powers, as previously described. Moreover it makes feasible the inspection of cooperative records under section 220(g) of the Act. Such notice rules are necessary for effective enforcement of the limiting provisions of the exemption and the administration of the inspection of cooperative records. Monitoring compliance with the terms of the agricultural cooperative exemption is a continuing function of the Commission requiring current cooperative information.

Heartland next takes the position that in prescribing the changes in the information called for in the BOp 102 form the Commission has exceeded its powers under the Act. We have already discussed the Commission's general power to administer and enforce the provisions of the Act and we believe the changes in the form BOp 102 are reasonably related to the Commission's statutory powers. The single page of information requested will aid in a determination of whether the entity is engaging in illegal, nonmember transportation activities that are not incidental and necessary to its primary purpose. All the data called for is relevant to the Commission's enforcement powers. In particular the few items of information regarding principal officers and directors of the filing cooperative will facilitate access to transportation records and overall enforcement of the exemption. The requirement of mere disclosure of certain transportation related activities of those individuals does not in any way violate the First Amendment freedom of association and Heartland's allegation that such information will be used by the Commission to selectively harass filing cooperatives is completely unfounded.

Likewise we see no merit to Heartland's objections to such officers certifying to the truth of the matters contained in the notice and the notarization of their signatures. We first call attention to the fact that certification has been required prior to the institution of this proceeding. The form BOp 102 now in use contains the certification paragraph where the principal officer must attest to the truth of the information and to the fact

that the entity represented qualifies as a cooperative as defined in the AMA. We have not initiated a new procedure here and Heartland's comments directed to this aspect of the Form BOp 102 are misplaced in this proceeding. All we have done with regard to certification is to increase from one to three the number of officers required to make such certification.

We have added the requirement of notarization. This serves to emphasize the importance of the accuracy of the information contained in the form and assure the veracity of such information. It is certainly within the Commission's power to require that the notice form be notarized and we see no valid reason why a legitimate agricultural cooperative would have objection to this procedure.

The Heartland petition claims that the form BOp 102 violates the Fifth Amendment (due process) and the Separation of Powers Clause of the United States Constitution in a number of respects; petitioners seek to introduce additional evidence in support of their position. We will treat the arguments and evidence *seriatim.*

Heartland asserts that the notice form purports to create a new federal felony, punishable in accordance with 18 U.S.C. section 1001, for filing statements which are not material or within the jurisdiction of the Commission. It goes on to state that the notice form is "pro forma," and was not intended to be relied upon by the Commission, other than as identification of the entity which, by its filing, becomes subject to the inspection powers of the Commission. It seeks to introduce as evidence the testimony of two officials of the Commission, testifying in the case of *United States* v. *Earl G. Talkington,* a criminal action in the United States District court, Central District of California, Appeal Pending CA 77-3165 (9th Cir). Such testimony was taken in July 1977 and could not be presented to the Commission during the time previously open for introduction of evidence.

We will not formally reopen this proceeding for the introduction of this evidence, which Heartland has not tendered but has only summarized, because this would cause an unwarranted setback to timely implementation of the rules. However, we will consider Heartland's arguments based on the summary it has presented, just as we have considered the argument of other participants. The formal submission and acceptance of this testimony into evidence would serve no useful purpose at this time and would only result in further delaying the effective date of the rules.

The gist of the testimony brought to our attention is that the BOp 102 notice is not relied upon or looked to by the Commission as certification of the facts contained in the notice and is used by the Commission for the purpose of initiating its own independent investigation of the cooperative's transportation activities.

The reason the Commission has treated the notice form in the manner expressed is that the experience of the Bureau of Investigations and Enforcement has shown that the statements contained in the notice cannot be relied upon for their veracity. In the past the Commission has found such statements to have been falsified and violators have been prosecuted. The testimony sought to be introduced here does not necessarily aid in proving Heartland's point. To the contrary, it forms the very basis for the Commission's effort to strengthen the penalties for falsification of the information contained in the Form BOp 102.

We fail to see exactly how a new federal felony has been created by the subject modification. We have already shown how all the information requested is material to the Commission's enforcement of the exemption. The making of any false statement would continue to constitute a crime as has always been the case; the reference to 18 U.S.C. section 1001 has always been printed on the form. Petititioner's theory seems to be based on the premise that the failure to file supplemental information required by our rules is a "non-statement" which cannot violate 18 U.S.C. section 1001 contrary to our warning

to that effect contained in the final rules. Petitioner's reasoning is not persuasive. The pertinent section of the regulation reads as follows:

> THE INFORMATION REQUESTED IS OF A CONTINUING NATURE AND ANY CHANGES IN THE INFORMATION CONCERNING OFFICERS, DIRECTORS, AND LOCATION OF TRANSPORTATION RECORDS IN THE NOTICE ON FILE SHALL BE BROUGHT TO THE COMMISSION'S ATTENTION BY THE FILING OF A SUPPLEMENTAL FORM BOp 102 WITHIN 30 DAYS OF SUCH CHANGE. THE FAILURE TO INFORM THE COMMISSION OF SUCH CHANGES *MAY* SUBJECT THE ASSOCIATION OR FEDERATION AND ITS OFFICERS AND DIRECTORS TO THE PENALTIES PRESCRIBED IN 18 U.S.C. SECTION 1001 (emphasis added).

It does not create a new federal penalty by mere reference to an existing statutory penalty that may be applicable. Moreover, the penal statute does encompass the "non-statement" situation. It reads as follows:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, *conceals* or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than 5 years, or both (emphasis added).

The statute would be applicable where an officer or director of an agricultural cooperative knowingly and willfully conceals information which it is otherwise obligated to furnish to the government in connection with certain nonmember

transportation activities. Furthermore, as the Railroads point out, Heartland's citation to the case *United States* v. *Bedore,* 455 F. 2d 1109 (9th Cir. 1972) does not support its position. In that case the Court said that section 1001 was intended to reach those false statements that might support fraudulent claims against the government, or that might pervert or corrupt the authorized functions of those agencies to whom the statements were made. The Court noted that the case before it was unrelated to any claim to a privilege from the United States. Concealment of information to enable an entity to retain an exemption under section 203(b)(5) together with its attendant economic advantages, would come within this general explanation. Concealment of the new location of transportation records or the whereabouts of officers authorized to permit inspections of such records, which have the effect of frustrating the enforcement functions of the Commission, would clearly fall within the intent and meaning of the statute.

Heartland makes two other arguments concerning the creation of a new federal felony which are wholly unrelated to our action in this proceeding. The first states that the filing of the BOp 102 notice represents a future intention of the filing entity to be a cooperative engaged in certain transportation activities, but a newly formed association filing the notice cannot determine, at that time, whether it can successfully meet the requirements of the AMA. We do not see how a crime is committed in this instance. Moreover, the modifications to the regulations and Form BOp 102 made in this proceeding did not alter either, (1) the existing requirement of certification that the filing entity is a cooperative as defined in the AMA, intending to perform a certain type of transportation, or (2) existing reference to 18 U.S.C. section 1001 following the certification.

Along the same lines Heartland states that a newly formed cooperative whose purpose is strictly member transportation must, in order to meet State requirements, file with the Commission a notice of its intent to perform certain nonmember transportation, and in so doing places itself in jeopardy of violating 18 U.S.C. Section 1001. It desires to introduce into

evidence the testimony of two persons who testified in the *Talkington* case regarding State rules and the Form BOp 102. Again this situation does not arise because of any action taken in this proceeding or in our regulations. It is primarily a matter which Heartland should more appropriately address to the States involved. Accordingly, we will not accept the evidence sought to be introduced which is irrelevant to anything we implemented in this proceeding.

The final alternative relief sought by the Heartland petition is a stay of the effective date of the regulations pending petitioners' application for judicial review. In light of our order of March 1, 1978 and petitioners' subsequent suit which it filed in the United States District Court for the District of Columbia on March 1, 1978, this issue is moot and we will deny petitioners' request.

We find on reconsideration:

The modifications of the regulations governing the agricultural cooperative transportation exemption adopted in our prior Report and order of December 22, 1977 are reasonable and necessary and should be prescribed, except that the changes in the regulation concerning one-way trip-leasing on certain nonfarm nonmember transportation which is incidental to a cooperative's primary transportation operation and necessary for its effective performance should be further clarified, as described in this decision and as set forth in the attached notice, to prevent possible misunderstanding or misinterpretation.

This decision and our promulgation of the modifications of the regulations adopted in our prior report and order do not constitute a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

It is ordered:

1. Subchapter A of Chapter X of Title 49 of the Code of Federal Regulations is amended by modifying Section 1047.21(a) as set forth in the attached notice.

2. The modification of the regulations adopted in our prior order of December 22, 1977, as further clarified and modified by this decision, shall become effective 60 days from the date of publication in the Federal Register of the notice of the adoption of the further modification to Section 1047.21(a) of the regulations in Subchapter A of Chapter X of Title 49 of the Code of Federal Regulations and shall remain in effect until modified or revoked in whole or in part by further order of the Commission.

3. Notice of this decision shall be given to the general public by depositing a copy thereof in the Office of the Secretary of the Commission at Washington, D.C., and by depositing a copy of the attached notice in the Office of the Federal Register. (49 U.S.C. 309, 302, 303, 304, 305, 311, and 320, and 5 U.S.C. 553 and 559).

4. Except as modified by this decision, the petitions for administrative review and other relief are denied, for the reasons stated in this decision of the Commission on reconsideration.

By the Commission.

(SEAL)

H. G. HOMME, JR.,
Acting Secretary.

TITLE 49—TRANSPORTATION
CHAPTER X—INTERSTATE COMMERCE COMMISSION
SUBCHAPTER A—GENERAL RULES AND REGULATIONS
PART 1047—EXEMPTIONS

EX PARTE NO. MC-75 (SUB-NO. 1)

AGRICULTURAL COOPERATIVE TRANSPORTATION EXEMPTION
(Modification of Regulations)

AGENCY: Interstate Commerce Commission

ACTION: Final regulations

SUMMARY: After initial modifications to the regulations were made in the Report and Order of the Commission of December 22, 1977 and after further consideration of the petitions for administrative review, the modification to the regulation governing one-way trip-leasing has been further clarified to prevent misunderstanding or misinterpretation.

EFFECTIVE DATE: 60 days from publication of this notice in the Federal Register.

FOR FURTHER INFORMATION CONTACT:

Michael Erenberg
(292-275-7292)

SUPPLEMENTARY INFORMATION: By Notice and Order entered November 18, 1976, the Commission on its own motion, instituted this rulemaking proceeding and published in the Federal Register proposed modifications to the regulations

pertaining to the agricultural cooperative transportation exemptions. Pursuant to a Report and Order of the Commission of December 22, 1977 modifications to the regulations were promulgated. These were published in volume 4 of the Federal Register on January 17, 1978. Petitions for administrative review were filed and among other things, the petitions contended that the modification to Subsection 1047.21(a) of the regulations was confusing and misleading. In order to clarify further the meaning of the modification and to prevent any possible misunderstanding or misconstruction the modification has been made more explicit in intent and meaning by the insertion of additional language.

The subsection now reads as follows (modification underlined):

> (a) The phrase "incidental to its primary transportation operation and necessary for its effective performance" means that the interstate transportation of the cooperative association or federation of cooperative association for nonmembers as described above is performed with the same trucks or tractors employed in a prior or subsequent trip in the primary transportation operation of the cooperative association or federation, that it is not economically feasible to operate the trucks or tractors empty on return trips (outbound trips in cases where the primary transportation operation is inbound to the association or federation), and that the additional income obtained from such transportation is necessary to make the primary transportation operation financially practicable. <u>Transportation for nonmembers as described above performed by a cooperative or federation through the use of trucks or tractors trip-leased for one-way movements with the cooperative association or federation acting as leasee, is not incidental and necessary</u> . . . .

APPENDIX D

STATUTES AND REGULATIONS

United States Constitution, Amendment V.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Interstate Commerce Act.

SECTION 203(b)(5), 49 U.S.C. 303(b)(5).

"Nothing in this chapter, except the provisions of Section 304 of this title relative to qualifications and maximum hours of service of employees and safety of operations or standards of equipment shall be construed to include. . . (5) motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended, or by a federation of such cooperative associations, if such federation possesses no greater powers of purposes than cooperative associations so defined, but any interstate transportation performed by such a cooperative association or federation of cooperative associations for nonmembers who are neither farmers, cooperative associations, nor federations thereof for compensation, except transportation otherwise exempt under this chapter, shall be limited to that which is incidental to its primary transportation operation and necessary for its effective performance and shall in no event exceed 15 per centum of its total interstate transportation services in any fiscal

year, measured in terms of tonnage: *Provided,* That, for the purposes hereof, notwithstanding any other provision of law, transportation performed for or on behalf of the United States or any agency or instrumentality thereof shall be deemed to be transportation performed for a nonmember: *Provided further,* That any such cooperative association or federation which performs interstate transportation for nonmembers who are neither farmers, cooperative associations, nor federations thereof, except transportation otherwise exempt under this chapter, shall notify the Commission of its intent to perform such transportation prior to the commencement thereof: *And provided further,* That in no event shall any such cooperative association or federation which is required hereunder to give notice to the Commission transport interstate for compensation in any fiscal year of such association or federation a quantity of property for nonmembers which, measured in terms of tonnage, exceeds the total quantity of property transported interstate for itself and its members in such fiscal year;

SECTION 204(f), 49 U.S.C. 304(f).

"Exceptions to regulations for use of vehicles owned by others.

* * * * *

(f) Nothing in this chapter shall be construed to authorize the Commission to regulate the duration of any such lease, contract, or other arrangement for the use of any motor vehicle, with driver, or the amount of compensation to be paid for such use—

> (1) where the motor vehicle so to be used is that of a farmer or of a cooperative association or a federation of cooperative associations, as specified in section 303(b) (4a) or (5) of this title, or is that of a private carrier of property by motor vehicle as defined in section 303(a)(17) of this title and is used regularly in the transportation of property of a character embraced within section 303(b)(6) of this title or perishable products manufactured from perishable property of a character embraced within section

303(b)(6) of this title, and such motor vehicle is to be used by the motor carrier in a single movement or in one or more of a series of movements, loaded or empty, in the general direction of the general area in which such motor vehicle is based.. . . ."

ENERGY POLICY AND CONSERVATION ACT, Section 382(b), 42 U.S.C. 6362(b).

"(b) Except as provided in subsection (c) of this section, each of the agencies specified in subsection (a)(1) of this section shall, where practicable and consistent with the exercise of their authority under other law, include in any major regulatory action (as defined by rule by each such agency) taken by each such agency, a statement of the probable impact of such major regulatory action on energy efficiency and energy conservation."

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969, Section 102, 42 U.S.C. 4332.

"The Congress authorizes and directs that, to the fullest extent possible: . . . (2) all agencies of the Federal Governmental shall—

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should be implemented. . . .

CODE OF FEDERAL REGULATIONS, Title 49, Sections 1047.21, 22 and 23 [Material italicized is that added by the Commission's Order in this case].

"1047.21. Computation of tonnage allowable in nonfarm-nonmember transportation.

Interstate transportation performed by a cooperative association or federation of cooperative associations for nonmembers who are neither farmers, cooperative associations, nor federations thereof for compensation, except transportation otherwise exempt under Part II of the Act, shall be limited to that which is incidental to its primary transportation operation and necessary for its effective performance and shall in no event exceed 15 percent of its total interstate transportation services in any fiscal year, measured in terms of tonnage. A cooperative association or federation of cooperative associations may transport its own property, its members' property of other farmers and the property of other cooperatives or federations in accordance with existing law, except insofar as the provisions of §1047.22 may be applicable with respect to the limit on member/nonmember transporation.

(a) The phrase "incidental to its primary transportation operation and necessary for its effective performance" means that the interstate transportation of the cooperative association or federation of cooperative associations for nonmembers as described above is performed with the same trucks or tractors employed in a prior or subsequent trip in the primary transportation operation of the cooperative association or federation that it is not economically feasible to operate the trucks or tractors empty on return trips (outbound trips in cases where the primary transportation-operation is inbound to the association or federation), and that the additional income obtained

from such transportation is necessary to make the primary transportation operation financially practicable. *Transportation performed by a cooperative or federation through the use of one-way trip-leased vehicles is not incidental and necessary;*

(b) The base tonnage to which said 15 percent limitation is applied is all tonnage of all kinds transported by the cooperative association or federation of cooperative associations in interstate or foreign commerce, whether for itself, its members or nonmembers, for or on behalf of the United States or any agency or instrumentality thereof, and that performed within the exemption provided by section 203(b)(6) of the Act."

"1047.22. Nonmember transportation limitation and record keeping.

(a) Overall limitation of nonmember transportation. No cooperative association or federation of cooperative associations which is required to give notice to the Commission under §1047.23 may engage in nonmember interstate transportation for compensation in any fiscal year which, measured in terms of tonnage, exceeds its total interstate member transportation in such fiscal year.

(b) Records of interstate transportation when nonmember transportation is performed. Any cooperative association or federation of cooperative associations as defined in this part performing interstate transportation for nonmembers and required to give notice to this Commission under §1047.23 shall prepare and retain for a period of at least two years written records of all interstate transportation performed for members and nonmembers. Such records shall contain (1) the date of the shipment, (2) the names and addresses of the consignor and consignee, (3) the origin and destination of the shipment, (4) a description of the articles in the shipment, (5) the weight or volume of the shipment, (6) a description of the equipment used either by unit number or license number and, in the event this equipment is nonowned, the name and address of its owners and drivers, (7) the total charges collected, (8) a copy of all leases

executed by the cooperative association or federation of cooperative associations to obtain equipment to perform transportation under section 203(b) (5), (9) whether the transportation performed is (i) member transportation as defined in §1047.20(f), (ii) nonmember transportation for non-members who are farmers, cooperative associations, or federations thereof, (iii) other nonmember transportation, and if of class (iii), how such transportation was incidental and necessary as defined in §1047.21(a).

CODE OF FEDERAL REGULATIONS, Title 49, Sections 1108.9, 1108.10.

"§1108.9 Actions with a potential effect on the environment.

(a) The following classes of actions may have environmental issues present, but normally do not require an EIS:

(6) Rulemaking and legislative proposals affecting carrier operations; . . .

(b) Actions listed in paragraph (a) of this section will be examined on a case-by-case basis, with the supporting data, in order to determine whether a SEND is appropriate, or whether further environmental analysis, in the form of an EIS or TAS, may be required."

"§1108.10 Actions where no environmental issues are present.

(a) If it is determined that the Federal action contemplated is not "major" in character within the meaning of NEPA, or that the environmental impacts are inconsequential or not cognizable under NEPA, or that the allegations of impacts are frivolous, an initial procedural order shall include a SEND stating that the proposal is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

(b) For proceedings not listed in §§1108.8(d) and 1108.9(a) the initial procedural order will normally contain a SEND. If any interested person, or the Commission on its own

initiative, identifies environmental issues of consequence, an action falling within the scope of this section will be subject to further environmental evaluation."

CODE OF FEDERAL REGULATIONS, Title 49, Sections 1045.3, 1051.1.

"§1045.3 Records to be kept by brokers.

Each broker shall keep and retain for a period of three years an exact record of each transaction in which he participates, which record shall show for each transaction:

(a) Name and address of the consignor.

(b) Name, address, and the lead or principal docket number of the originating motor carrier.

(c) Bill of lading or freight bill number.

(d) Description of commodity or commodities, weight, rate, and tariff reference.

(e) Date of shipment.

(f) Origin and destination of shipment.

(g) Amount of compensation received by the broker for brokerage service furnished and from whom it was received.

(h) Description of any non-brokerage service performed in connection with each particular shipment or otherwise, amount of compensation received for such service, and from whom such compensation was received.

(i) If freight charges are collected by the broker, the record shall show, for each shipment, the amount collected and the date of payment to the carrier."

"§1051.1 Information to be shown.

(a) Every common carrier by motor vehicle subject to the jurisdiction of this Commission shall, on and after the first day

of January, 1937, cause to be shown on the face of each and every receipt or bill of lading issued for the transportation of property by such carrier in interstate or foreign commerce, information which shall include the names of the consignor and consignee; the points of origin and destination; the number of packages, description of the articles, and weight, volume or measurement (if the lawfully applicable rates or charges are published to apply per unit of weight volume or measurement) of the property received; and a record of this information shall be kept by the carrier by the preservation of a copy of such receipt or bill of lading.

(b) Every common carrier by motor vehicle subject to the jurisdiction of this Commission shall, on and after the first day of January, 1937, when collecting transportation charges, issue a freight or expense bill covering each shipment, and the original of such freight or expense bill shall be receipted on payment of the transportation charges and furnished to the shipper or the receiver, whichever may pay the charges; and shall cause to be shown on the face thereof the names of the consignor and consignee (except that as to reconsigned shipments the freight or expense bill shall not show the name of the original consignor); the date of shipment, the points of origin and destination (except that as to reconsigned shipments the freight or expense bill shall not show the original shipping point unless the final consignee pays transportation charges from such original shipping point); the number of packages, description of the articles, and weight, volume or measurement of the property transported (if the lawfully applicable rates or charges are published to apply per unit of weight, volume or measurement); the exact rate or rates assessed; the total charges to be collected including a statement of the nature and amount of any charges for special service and the points at which such special services was rendered; the route of movement indicating each carrier participating in the transportation service, and the transfer point or points through which the shipment moved; and a record of this information shall be kept by the preservation of a copy of such freight or expense bill."

Supreme Court, U. S.
FILED
SEP 19 1979
MICHAEL RODAK, JR., CLERK

No. 79-39

In the Supreme Court of the United States

OCTOBER TERM, 1978

LAWRENCE MARQUETTE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-5a) is unreported. The decisions of the Interstate Commerce Commission in the rulemaking proceeding (*id.* at 6a-87a) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on April 26, 1979. A petition for rehearing was denied on May 30, 1979. The petition for a writ of certiorari was filed on July 9, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission's prohibition of one-way trip leasing of vehicles by agricultural cooperatives for nonmember, nonfarm transportation is consistent with Section 203(b)(5) of the Interstate Commerce Act.

2. Whether the Interstate Commerce Commission's record keeping and notice requirements for agricultural cooperatives are within the Commission's statutory authority.

STATEMENT

In 1968, Congress enacted Pub. L. No. 90-433, 82 Stat. 448, as an amendment to the agricultural cooperative transportation exemption set forth in Section 203(b)(5) of the Interstate Commerce Act, 49 U.S.C. 303(b)(5).[1] The amendment was intended to restrict and clarify the scope of the exemption from Interstate Commerce Commission regulation afforded motor vehicles controlled and operated by agricultural cooperatives and to enable the Commission "to proceed more effectively against illegal operators masquerading as bona fide agricultural cooperatives." S. Rep. No. 1152, 90th Cong., 2d Sess. 2 (1968).

The 1968 amendment limited an agricultural cooperative's transportation for nonmembers who are neither farmers nor cooperative associations "to that which is incidental to [the cooperative's] primary transportation operation and necessary for its effective

[1]This provision has since been revised without substantive change and recodified as 49 U.S.C. 10526(a)(5). See Pub. L. No. 95-473, 92 Stat. 1337, 1364. Throughout this brief, we refer principally to the section numbers of 49 U.S.C. (1976 ed.) in effect at the time of the Commission's rulemaking decision.

performance." 49 U.S.C. 303(b)(5). It further provided that such nonmember, nonfarm transportation "shall in no event exceed 15 per centum of [the cooperative's] total interstate transportation services in any fiscal year, measured in terms of tonnage." *Ibid.* In addition, the amendment required that a cooperative intending to perform transportation for nonmembers who are neither farmers nor cooperatives must so notify the Commission prior to the commencement of such transportation, and it added a provision to Section 220 of the Act that specifically empowered the Commission to inspect the books, records, and other pertinent documents of any cooperative association required to give notice under Section 203(b)(5) as amended. 49 U.S.C. 320(g) (recodified as 49 U.S.C. 11144(c)).

In 1969, the Commission adopted regulations implementing the "incidental and necessary" test, tonnage restrictions, and notice requirements set forth in Pub. L. No. 90-433. 49 C.F.R. 1047.20 *et seq.*[2] However, as a result of numerous investigations and court proceedings, the Commission determined that its 1969 regulations were not effective in preventing illegal operations carried out by "sham" cooperatives and other organizations claiming the agricultural cooperative exemption (Pet. App. 9a, 15a). To remedy this problem, the Commission in 1977 promulgated new regulations that (1) added a single sentence to the Commission's existing regulation at 49 C.F.R. 1047.21(a) to make explicit that one-way trip leasing of vehicles by a cooperative for nonmember, nonfarm transportation does not meet the "incidental and necessary" test; (2) established a record keeping requirement for cooperatives engaged in nonmember, nonfarm

[2]No party sought judicial review of the Commission's 1969 implementing regulations.

transportation; and (3) revised the notice requirement set forth in the existing regulations to provide for more detailed and current notice to be given the Commission by cooperatives proposing to engage in nonmember, nonfarm transportation. It is these revisions to the Commission's regulations that are at issue in this case.

The court of appeals upheld the Commission's new rules in all respects. The court held that "explicit prohibition of one-way trip-leased movements is a rational exercise of the Commission's rulemaking authority and is fully consistent with Congressional intent" (Pet. App. 4a). The court also sustained the record keeping and revised notice requirements as reasonable and necessary for the Commission to carry out its enforcement responsibilities under Section 203(b)(5) (*ibid.*).

ARGUMENT

The court of appeals' decision is correct, does not conflict with any decision of this Court or any court of appeals, and does not warrant further review.

1. The Commission's explicit prohibition of one-way trip leasing by an agricultural cooperative for nonmember, nonfarm transportation is, as the court below correctly held (Pet. App. 4a), a reasonable interpretation of the Act and in full accord with congressional intent.

As indicated in the legislative history of the 1968 amendment to Section 203(b)(5), the "incidental and necessary" test requires that a cooperative's nonmember, nonfarm transportation have the direct relationship to its farm-related transportation that was found in *Northwest Agricultural Cooperative Association* v. *ICC*, 350 F. 2d 252 (9th Cir. 1965), cert. denied, 382 U.S. 1011 (1966). See H.R. Rep. No. 1667, 90th Cong., 2d Sess. 5 (1968); S. Rep. No. 1152, 90th Cong., 2d Sess. 12-13 (1968). The

Northwest case involved nonmember, nonfarm transportation that was limited to shipments moving in otherwise empty trucks on their return from hauling members' farm products to market. The court held that such transportation was "incidental and necessary" because it provided a backhaul to make an outbound farm-related shipment for a member of the cooperative economically feasible. 350 F. 2d at 255.

In contrast to the transportation described in *Northwest*, one-way trip leases for nonmember, nonfarm shipments are wholly unconnected with prior or subsequent farm-related movements by an agricultural cooperative and do not eliminate empty backhauls that would otherwise occur. As the Commission (Pet. App. 71a, 74a) and the court below (*id.* at 4a) properly held, such one-way trip leasing, by its very nature, is not "incidental or necessary" as that phrase was used by Congress. Thus, the Commission's construction of the Act is consistent with congressional intent.[3]

Moreover, as the court below noted (Pet. App. 3a-4a), one-way trip leases were implicitly prohibited by the Commission's 1969 regulations, which defined "incidental and necessary" to include only nonmember transportation "performed with the same trucks or tractors employed in a prior or subsequent trip in the primary transportation operation of the cooperative association" (49 C.F.R.

[3]The courts have consistently interpreted the phrase "incidental and necessary" as precluding a cooperative from engaging in nonmember, nonfarm traffic not directly related to a prior or subsequent farm-related movement, regardless of the economic benefits accruing to the cooperative. See, *e.g.*, *ICC* v. *Milk Producers Marketing Company*, 405 F. 2d 639, 641-642 (10th Cir. 1969). See also *Munitions Carriers Conference, Inc.* v. *American Farm Lines*, 415 F. 2d 747, 750 (10th Cir. 1969).

1047.21(a)). Hence, the new rule "merely makes explicit the implicit prohibition against one-way trip leasing contained in section 203(b)(5) and the Commission's existing regulations" (Pet. App. 3a). The construction of a statute by the agency charged with its administration " 'should be followed unless there are compelling indications that it is wrong.' " *Beal* v. *Doe*, 432 U.S. 438, 447 (1977). The Commission's construction of Section 203(b)(5), consistently adhered to since its enactment, was therefore properly sustained by the court of appeals.[4]

2. Petitioners' assertion (Pet. 15-17) that the Commission exceeded its statutory authority in adopting the record keeping and revised notice requirements is without merit and was correctly rejected by the court of appeals (Pet. App. 4a).

The Commission adopted the record keeping requirements pursuant to its general authority to administer the provisions of the Interstate Commerce Act (Pet. App. 20a-21a, 47a, 76a-77a). See Section 204(a)(6) of the Act, 49 U.S.C. 304(a)(6) (recodified as 49 U.S.C. 10321).[5] Under its general administrative authority, "the Commission has the power to adopt regulations to carry out the policies of the laws which it administers if such regulations have a reasonable and rational basis, even though no specific authority to promulgate regulations on

[4]Contrary to petitioners' assertion (Pet. 15), the Commission considered the energy and environmental impact of its rulemaking decision (Pet. App. 74a-75a). As the court below held (*id.* at 4a), "the Commission explicitly considered the energy and environmental implications of its action and reasonably concluded that the prohibition on one-way trip leasing should have no significant impact" in those areas. In any event, the Commission's rulemaking proceeding simply clarified existing law on one-way trip leasing and thus did not constitute a major action requiring assessment of energy or environmental impact.

[5]The Commission also referred (Pet. App. 47a, 77a) to its authority under Section 220(g), 49 U.S.C. 320(g), discussed at page 7, *infra*.

the subject is contained in the statute." *Greyhound Corp.* v. *United States*, 221 F. Supp. 440, 444 (N.D. Ill. 1963). Accord, *American Trucking Assn's* v. *United States*, 344 U.S. 298, 309-313 (1953); *United States* v. *Resler*, 313 U.S. 57, 60-61 (1941).

In this case, the Commission's authority to enforce the limitations set forth in Section 203(b)(5) had been frustrated by the failure of some cooperatives to maintain records of their nonfarm, nonmember transportation (Pet. App. 46a, 76a). The record keeping requirements in the amended regulations were designed to eliminate this impediment to effective enforcement of the statutory limitations. As the court below held (*id.* at 4a), "the record keeping requirements * * * are needed if the Commission is to fulfill its statutory responsibility to enforce the tonnage limitations in §203(b)(5)."

Petitioners further contend (Pet. 15-16) that the record keeping regulation violates the proviso clause of Section 220(g), 49 U.S.C. 320(g) (recodified as 49 U.S.C. 11144(c)). Section 220(g) authorizes the Commission to "have access to and * * * to inspect, examine, and copy any and all accounts, books, records, memorandums, correspondence, and other documents," subject to the proviso that "the Commission shall have no authority to prescribe the form of any accounts, records, or memorandums to be maintained by a cooperative association * * *."[6] Section 220(g) explicitly enhances the power of the Commission to obtain information necessary to the enforcement of the Act (Pet. App. 47a, 77a), and the limitation contained in the proviso cannot be read to

[6]Various sections of the Interstate Commerce Act specifically authorize the Commission to impose a uniform system of accounts, records and memoranda on carriers and certain other persons subject to the Act. See Sections 20(5), 220(d), 49 U.S.C. 20(5), 320(d) (recodified as 49 U.S.C. 11142, 11144).

defeat the agency's basic authority. Moreover, the record keeping requirement is not inconsistent with the proviso clause of Section 220(g) because it does not prescribe the form of any records that agricultural cooperatives must keep but simply requires cooperatives to maintain certain nonmember transportation information in their records in whatever form they choose. As the court of appeals observed (Pet. App. 4a), "[t]he regulations do not run afoul of §220(g) since they only require that certain information be recorded and do not dictate the form in which that information is to be kept."

Petitioners' final challenge is to the revised notice requirements (Pet. 16). The Commission adopted these provisions pursuant to the mandate of Section 203(b)(5) that any cooperative performing interstate transportation for nonmembers "shall notify the Commission of its intent to perform such transportation prior to the commencement thereof." The revised notice requirements merely require a cooperative proposing to engage in nonmember transportation to inform the Commission of certain minimal but essential facts relating to its current identity, organization, and storage of records. As the court below properly concluded (Pet. App. 4a), "[t]he Commission's regulations are not overly burdensome and are reasonably designed to provide the Commission with the information needed to determine whether those cooperatives proposing to engage in nonfarm, nonmember transportation are rightfully entitled to the exemption under §203(b)(5)."[7]

[7]Petitioners also complain (Pet. 16-17) that the requisite certification under the revised notice regulation, made subject to criminal sanction pursuant to 18 U.S.C. 1001, violates the Fifth Amendment because it "require[s] impossible knowledge of future acts and complicated legal issues * * *." However, this contention is both premature (see, *e.g.*, *O'Shea* v. *Littleton*, 414 U.S. 488, 497-498 (1974)) and insubstantial (see, *e.g.*, *United States* v. *Weatherspoon*, 581 F. 2d 595, 601 (7th Cir. 1978)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1979

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-39

LAWRENCE MARQUETTE, MIDWESTERN FARM LINES, INC. AND HARVEST MOON FARM LINES, INC.
Petitioners,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA NATIONAL COUNCIL OF FARMER COOPERATIVES AMERICAN TRUCKING ASSOCIATIONS, INC. COMMITTEE ON TRANSPORTATION PRACTICES, INC. TRAFFIC EXECUTIVE ASSOCIATION-EASTERN RAILROADS WESTERN RAILROAD TRAFFIC ASSOCIATION SOUTHERN FREIGHT ASSOCIATION ASSOCIATION OF AMERICAN RAILROADS IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-39

LAWRENCE MARQUETTE, MIDWESTERN FARM LINES, INC. AND HARVEST MOON FARM LINES, INC.
Petitioners,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA NATIONAL COUNCIL OF FARMER COOPERATIVES AMERICAN TRUCKING ASSOCIATIONS, INC. COMMITTEE ON TRANSPORTATION PRACTICES, INC. TRAFFIC EXECUTIVE ASSOCIATION-EASTERN RAILROADS WESTERN RAILROAD TRAFFIC ASSOCIATION SOUTHERN FREIGHT ASSOCIATION ASSOCIATION OF AMERICAN RAILROADS IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. 3a-5a) is unreported. The Decisions of the Interstate Commerce Commission (Pet. App. B and C 6a-85a) are not reported.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. § 1254.

QUESTION PRESENTED

Whether revised regulations of the Interstate Commerce Commission implementing the agricultural cooperative exemption of the Interstate Commerce Act are valid.

STATEMENT

Following enactment of amendments to the agricultural cooperative exemption of the Interstate Commerce Act, the Interstate Commerce Commission in 1969 prescribed regulations governing the operations of motor vehicles controlled and operated by agricultural cooperatives. In late 1976 the Commission, realizing that its regulations had not had the contemplated effect of preventing unlawful motor carrier operations and solicitations by "sham" agricultural cooperatives, instituted a further rulemaking proceeding. The stated purposes for the instant rulemaking were (1) to define more clearly the exemption from regulation accorded motor vehicles controlled and operated by agricultural cooperatives or federations thereof and (2) to formulate new and revised requirements concerning record keeping and notice to the ICC with respect to certain transportation provided by agricultural cooperatives (Pet. App. 8a).

In its initial report (Pet. App. 6a-63a), the Commission analyzed the relevant legislative history of both the

Agricultural Marketing Act and the agricultural cooperative exemption of the Interstate Commerce Act (Pet. App. 10a-15a), and the submissions of the parties (Pet. App. 15a-19a). As here pertinent, the Commission adopted two regulations which (a) expressly prohibited one-way trip-leasing of vehicles to agricultural cooperatives for nonmember-nonfarm transportation (Pet. App. 42a-46a); and (b) required the agricultural cooperatives to maintain information that would permit verification of tonnage and revenue limitations imposed by the Interstate Commerce Act (Pet. App. 46a-56a).

Following the filing of petitions seeking administrative review, the Commission issued its decision on reconsideration (Pet. App. 64a-87a). In its decision the Commission focused on the prohibition against one-way trip-leasing and the need for record keeping requirements. As summarized by the Commission, the object of the statutory exemption permitting agricultural cooperatives to transport a limited amount of nonmember, non-farm traffic without authority "is merely to enable them to round out their transportation operation utilizing the same power equipment employed in their primary transportation movements in the opposite direction" (Pet. App. 71a). The Commission also reasoned (*id.*) that since a one-way trip-lease "does not involve the use of the same vehicle on both the outbound and inbound movements, and will not offset a loss otherwise encountered by equipment participating in an outbound member move," it cannot qualify as being "incidental and necessary" within the meaning of the statutory exemption.

After noting that Congress specifically and intentionally placed limits on the type and amount of traffic which qualifies for the agricultural cooperative exemption, the Commission concluded (Pet. App. 76a) that its proposed rule "is a necessary complement to the Commission's inspection powers over cooperative transportation records."

As the Commission further reasoned, "without the authority to prescribe the keeping of such information the investigatory powers to determine compliance have little practical value" (Pet. App. 77a).

On a petition to review these rules, the court of appeals held that "the explicit prohibition of one-way trip-leased movements is a rational exercise of the Commission's rulemaking authority and is fully consistent with Congressional intent" (Pet. App. 4a). The court of appeals also upheld the record keeping requirements which it found to be needed if the Commission is to fulfill its statutory responsibilities to enforce the statutory tonnage limitations.

ARGUMENT

The decision of the court below is correct, and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. Petitioners' basic contention is that the Interstate Commerce Commission, through the exercise of its rulemaking powers, has encroached on statutorily exempt transportation services of agricultural cooperatives (Pet. 5). The relevant legislative history of the 1968 amendments to the agricultural cooperative exemption contained in section 203(b)(5) of the Interstate Commerce Act (49 U.S.C. 303(b)(5)[1] repudiates this contention.[2]

In revising its regulations implementing the agricultural cooperative exemption, the Commission merely clarified the scope of the exemption afforded nonmember, non-

[1] This provision has been recodified without substantive changes at 49 U.S.C. § 10526(a)(5).

[2] Although raised in a different context, the relationship between the two remedial statutes, the Interstate Commerce Act and the Agricultural Marketing Act, said by the petitioners to require exploration, was considered by this Court in *Bray Lines, Inc.* v. *United States*, 353 F. Supp. 1240, 1242-44 (W.D. Okla. 1973), aff'd mem., 414 U.S. 802, 94 S.Ct. 59.

farm transportation and confined such transportation to that which is incidental to a cooperative's primary transportation operation and necessary for its effective performance. As recognized by the lower court (Pet. App. 3a) the Commission's actions in this respect are supported by relevant legislative history which makes clear the Congressional intent to exempt only that nonmember, nonfarm transportation which satisfied the "incidental and necessary" test described in *Northwest Agricultural Cooperative Association, Inc. v. Interstate Commerce Commission*, 350, F.2d 252 (9th Cir.), *cert. denied*, 382 U.S. 1011. As there defined, transportation of nonfarm products and supplies was incidental "because limited to otherwise empty trucks returning from hauling member farm products to market" and necessary "because it is not economically feasible to operate the trucks empty on return trips". As recognized by the Commission (Pet. App. 70a-71a), a one-way trip-lease involves vehicles leased from another entity and by definition, "does not involve use of the same vehicle on both the outbound and inbound movements and will not offset a loss otherwise encountered by equipment participating in an outbound member move." Hence such movements, by definition, cannot satisfy the "incidental and necessary" standard.[3]

2. Nor is there merit to petitioners' contention that the Commission's revised notice and record keeping requirements exceed the Commission's statutory authority. After noting the mandate in section 203(b)(5) that any cooperative performing interstate transportation for non-

[3] Economic benefit alone will not meet the "incidental and necessary" test. *See I.C.C.* v. *Milk Producers Marketing Company*, 405 F. 2d 639, 641-642 (10th Cir. 1969); *see also, Munitions Carriers Conference, Inc.* v. *American Farm Lines*, 415 F. 2d 747, 750 (10th Cir. 1969). Petitioners' strained argument that one-way trip-leasing by an agricultural cooperative satisfies the "incidental and necessary" standard because the practice inures to the benefit of the cooperative, is without merit.

members "shall notify the Commission of its intent to perform such transportation prior to the commencement thereof" (Pet. App. 4a), the lower court found the regulations are not overly burdensome and are reasonably designed to provide the Commission with necessary information.[4] The lower court further upheld the Commission's record keeping requirements when it found them to be needed "if the Commission is to fulfill its statutory responsibility to enforce the tonnage limitations" (Pet. App. 4a) that are contained in the agricultural cooperative exemption.

The Commission's regulations, which are consistent with the provisions of the Interstate Commerce Act and necessary to permit the Commission to discharge its duties thereunder, are rational in all respects. The lower court correctly affirmed them. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, —— U.S. ——, 98 S.Ct. 1197, 1211.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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[4] The reasonableness of the revised notice regulations is borne out by the fact that legitimate agricultural cooperatives have complied with the rules without any undue burden. *See*, e.g., notices to the Commission of intent to perform nonmember, nonexempt, interstate transportation at 44 Fed. Reg. 41, 981-41, 982 (1979).

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PETITIONERS' REPLY TO BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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This Brief is submitted in reply to the Brief of the United States and the Interstate Commerce Commission ("Commission") in opposition to the Petition for Writ of Certiorari herein. This Reply Brief responds to the arguments on the part of the Government that the Commission's record keeping requirements do not violate the proviso clause of Section 220(g), 49 U.S.C. 320(g) (recodified as 49 U.S.C. 11144(c)).

The proviso clause, following a Congressional grant of power to the Commission to gain access to all books and

records of cooperative associations required to give notice under section 203(b)(5) (49 U.S.C. 303(b)(5)), (recodified 10526(a)(5)), states: "That the Commission shall have no authority to prescribe the form of any accounts, records, or memorandums to be maintained by a cooperative association or federation of cooperative associations."

In essence, the Government argues that the Commission's requirements, detailed as they are,[1] "cannot be read to" violate the plain language of the proviso clause because that would make it difficult for the Government.[2] The

[1] The challenged Commission regulations, 49 C.F.R. 1047.22, provide that any cooperative association performing interstate transportation for nonmembers and required to give notice to the Commission shall prepare and retain for at least two years records of all interstate transportation performed for members and nonmembers. The regulation further requires that:

> "Such records shall contain (1) the date of the shipment, (2) the names and addresses of the consignor and consignee, (3) the origin and destination of the shipment, (4) a description of the articles in the shipment, (5) the weight or volume of the shipment, (6) a description of the equipment used either by unit number or license number and, in the event this equipment is nonowned, the name and address of its owners and drivers, (7) the total charges collected, (8) a copy of all leases executed by the cooperative association or federation of cooperative associations to obtain equipment to perform transportation under section 203(b)(5), (9) whether the transportation performed is (i) member transportation as defined in § 1047.20(f), (ii) nonmember transportation for nonmembers who are farmers, cooperative associations, or federations thereof, (iii) other nonmember transportation, and if of class (iii), how such transportation was incidental and necessary as defined in § 1047.21(a)."

[2] We note, for the record, that the Department of Justice, Antitrust Division concluded, in the Court of Appeals that it would "neither support nor oppose the orders of the Interstate Commerce Commission under review" in this proceeding.

Government argues further that because the "form of any records" is not prescribed by the Commission, (apparently defining that term as a government standardized reporting document), the proviso is not violated. (Br. in Opp. 7-8). We urge that this is not supported by logic or the legislative history.

We further submit this argument seeks to circumvent, or render meaningless, the plain language of the statute. It would negate the clear congressional intent of Congress to limit unreasonable encroachments by a regulatory agency on the freedom of private organizations and businesses to conduct their enterprises without unwarranted and burdensome government interference. Section 220(g) was enacted to give specific visitation powers to the Commission so as to clarify confusion regarding those powers which previously existed; it does not give the Commission power to require that Petitioner embark on a whole new series of records compilation at the dictate of the Commission. This provision makes clear that the Commission has power only to inspect and copy records *already kept in the ordinary course of business.*

This conclusion is reinforced by the Senate report on the legislation (90th Cong. 2d Sess. Rep. No. 1152 at 16 (May 28, 1968)):

> "[T]he Commission advised the committee that it understood the purpose of this provision was to clarify the right of the Commission to exercise visitorial powers over the records and books of the associations required to give notice; and, therefore, nothing in this provision would be considered to derogate or otherwise affect the Commission's present powers to investigate the activities of such associations under section 204(c) or to obtain access to their books and records under section 205(d), whether or not the

required notice had been given, where it appeared that the activities of a cooperative were not within the scope of the exemption.

The Committee agrees with the statement of the council witness on the meaning of this phrase, and with the understanding of the Commission that this clarifies the Commission's visitorial powers, and does not derogate from or affect the Commission's other present powers as above stated."

For these reasons, we urge that the Government's arguments be rejected.

CONCLUSION

It is respectively requested that the Petition for Writ of Certiorari herein be granted.

Respectfully submitted,

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